MONTANA LEGISLATIVE HISTORY

Chapter 1 19 83 Spec. Sess.

Bill H _____ S 2 Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Dec 15	✓ C	Hearing Date(s)	Dec 13	✓ C
		C			C
		C			C
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Date Out	Dec 15	✓ C		Dec 13	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

Joint Judiciary Committee

Dec 12

SENATE BILL NO. 2
SPECIAL SESSION - DECEMBER 1983

INTRODUCED BY MAZUREK, H. HAMMOND, TVEIT, HAFFEY

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

IN THE SENATE

December 12, 1983	Introduced and referred to Committee on Judiciary.
December 13, 1983	Committee recommend bill do pass as amended. Report adopted.
	Statement of Intent attached.
December 14, 1983	Bill printed and placed on members' desks.
	On motion rules suspended. Bill referred to second reading for consideration this day.
	Second reading, do pass as amended.
	On motion rules suspended. Bill placed on calendar for third reading this day.
	Third reading, passed. Ayes, 42; Noes, 7. Transmitted to House.

IN THE HOUSE

December 14, 1983	Introduced and referred to Committee on Judiciary.
December 15, 1983	Committee recommend bill be concurred in as amended. Report adopted.
	Statement of Intent amended.
	On motion rules suspended and bill placed on second reading this day.

Second reading, concurred in as amended.

Statement of Intent amended.

On motion rules suspended and bill placed on third reading this day.

Third reading, concurred in. Returned to Senate with amendments.

Statement of Intent returned to Senate with amendments.

IN THE SENATE

December 15, 1983 — Returned to Senate with amendments and Statement of Intent as amended.

December 16, 1983 — Second reading, amendments not concurred in.

On motion Conference Committee requested and appointed.

Conference Committee dissolved.

On motion, Free Conference Committee requested and appointed.

Free Conference Committee reported.

Second reading, Free Conference Committee report adopted.

Third reading, Free Conference Committee report adopted. Ayes, 36, Noes, 14.

IN THE HOUSE

December 17, 1983 — Free Conference Committee report rejected.

IN THE SENATE

December 17, 1983 — On motion, Senate reconsider action taken in adopting Free Conference Committee report on 12/16/83. Ayes, 48; Noes, 0.

On motion, new Free Conference Committee requested and appointed.

New Free Conference Committee reported.

On motion, rules suspended. Bill referred to second reading for consideration this day.

Second reading, new Free Conference Committee report adopted.

On motion, rules suspended. Bill placed on calendar for third reading this day.

Third reading, new Free Conference Committee report adopted.

IN THE HOUSE

December 17, 1983 — New Free Conference Committee report adopted.

Sent to enrolling.

Reported correctly enrolled.

SENATE BILL NO. 2

INTRODUCED BY MAZUREK

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; AMENDING SECTIONS 10-2-402, 49-3-103, AND 49-3-201, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

NEW SECTION. Section 2. Purposes. The purposes of [sections 1 through 10] are to reward veterans for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans and handicapped persons.

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual who:

(a) served on active duty;

(b) has been separated from service under honorable conditions; and

(c) suffers a service-connected disability determined by the United States veterans administration to be 30% or more disabling.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department

of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

(iv) a unit, as defined in 20-25-201, for a position

within the Montana university system;

(v) the office of commissioner of higher education for a position within that office;

(vi) a college for a position within that college;

(vii) a center or program for a position within the postsecondary vocational-technical education system;

(viii) a city or town for a municipal position, including a city or municipal court position; and

(ix) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)(ix) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)(ix) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, college, including a community college, postsecondary vocational-technical center or program, university, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

(9) "Under honorable conditions" means a discharge or separation from active duty characterized as under honorable conditions. The term includes honorable discharges and general discharges but does not include dishonorable discharges or other administrative discharges characterized as other than honorable.

(10) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense; and

(ii) has been separated from service under honorable conditions.

(b) The term does not include a person receiving retirement pay from the United States based on length of military service.

(11) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and

ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

NEW SECTION. Section 5. Eligibility requirements. No

veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

(1) he is a United States citizen;

(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;

(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and

(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

NEW SECTION. Section 6. Certification of handicapped persons. The department of social and rehabilitation services shall certify persons as handicapped for the purpose of employment preference as provided in [sections 1 through 10].

NEW SECTION. Section 7. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling

condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for life. However, once he has obtained a position because of the application of the employment preference, he may not use the preference again.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment preference for as long as the person is missing in action or a prisoner of war.

NEW SECTION. Section 8. Enforcement of preference. (1) A public employer shall, by posting and on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim is a complete defense to an action under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each

applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. The public employer has the burden of making a clear showing that the applicant was not substantially equally qualified with the person hired.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or

on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i), the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local

as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10]."

Section 12. Section 49-3-103, MCA, is amended to read:

"49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap:

(a) when based on the preference provided in [sections 1 through 10];

(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or

(c) where the differentiation is based on reasonable

factors other than age;

(2) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) from discharging or otherwise disciplining an individual for good cause."

Section 13. Section 49-3-201, MCA, is amended to read:

"49-3-201. Employment of state and local government personnel. (1) ~~State~~ Except as provided in [sections 1 through 10], state and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training

programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall insure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to insure utilization of minority group persons."

NEW SECTION. Section 14. Repealer. Subject to section 16(3)(a) of this act, sections 10-2-201 through 10-2-206, MCA, are repealed.

NEW SECTION. Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 16. Effective date -- applicability -- saving clause. (1) This act is effective on passage and approval.

(2) Except as provided in subsection (3)(b), this act applies only to positions that are filled after the effective date of this act.

(3) (a) Subject to the applicable statute of limitations and to subsection (3)(c), a claim for violation of 10-2-201 through 10-2-206, whether or not it is pending

in court on the effective date of this act, may be pursued under and must be governed by 10-2-201 through 10-2-206.

(b) However, the only relief that may be granted on a claim described in subsection (3)(a) is that provided in section 8(4)(c)(iii) of this act, and the court may grant no other relief, including that provided in 10-2-206 or any judicial construction of 10-2-206.

(c) A claim under 10-2-201 through 10-2-206 must be filed within 60 days after the effective date of this act.

-End-

MINUTES OF THE MEETING OF THE JOINT JUDICIARY COMMITTEE
DECEMBER 12, 1983

The hearing on the Montana Veterans and Handicapped Persons Employment Preference Act was called to order at 2:00 p.m., in the chambers of the House of Representatives. Roll call was taken and all members of the committee were present. Senator Jean Turnage and Representative Dave Brown served as co-chairman for the hearing.

SENATOR TURNAGE asked the sponsors of House Bills 2 through 9 and Senate Bills 1 through 3 to speak briefly, explaining their respective bills. He also asked that all witnesses limit their testimony to five minutes or less so that all who wish to testify will be able to do so.

SENATE BILL 1

SENATOR STAN STEPHENS, of Havre, introduced Senate Bill 1, which is legislation to repeal the present employment preference statutes. He noted that he is a veteran of the Korean conflict. He feels that the majority of Montana's military veterans neither desire nor need special preference over other Montanans in order to qualify for employment. He feels, likewise, that the handicapped and disabled citizens do not desire special preference in order to qualify for employment. He supports the nation's obligation to those who paid with their lives and those who were disabled in service, but he cannot support the continuation of employment preference to veterans because it goes beyond what is morally right or necessary and has proven to be detrimental to the rights and privileges of all Montanans. He said we should not condone job discrimination against those who are not veterans.

He concluded by stating that veterans and handicapped citizens throughout the state have expressed to him their support for repeal of the employment preference. He asked who is to say, with certainty, what limits, if any, should be placed on benefits to veterans and if all veterans are equal in receiving benefits. He feels that Montana's veterans and the handicapped are fully able and qualified to compete for employment now and that preference for one results in discrimination to another. (See EXHIBIT 1.)

SENATE BILL 2

SENATOR JOE MAZUREK, of Helena, stated the members of the Joint Interim Committee on the employment preference have proposed Senate Bill 2 and House Bill 8 which will be moving through the

committees at the same time and are basically the same bills. They attempted to establish a checklist which would cover any conceivable policy issue identifiable regarding this issue, after exhaustive research and after testimony was heard.

The committee has proposed a policy to reward veterans for service to their country during combat eras, and that it is to be viewed as a tool for reintegration back into the workforce.

The committee also felt it was important to recognize the discrimination that the physically handicapped have suffered and to assist them to overcome this discrimination.

Senate Bill 2 would identify disabled veterans as those veterans who served on active duty and would also set a standard of 30% disability. Spouses and dependents have been eliminated except in categories such as spouses of veterans who died in active duty, spouses of veterans who suffered a 100% disability and spouses of those missing in action. Handicapped individuals are identified as those who have physical impairments. Mental impairments were specifically eliminated by the interim committee. The preference would apply only to initial hirings and would not apply to promotions or transfers. It is a relative preference and applies as a tie-breaker between applicants who have substantially equal qualifications.

To be eligible for the preference, a person must be a U.S. citizen, have resided in Montana for one year and also meet local requirements. The Department of Social and Rehabilitation Services (SRS) will be responsible for certifying the physically handicapped. Preference for the disabled would apply as long as the disability continued. In the case of a veteran, the preference would be for life but could only be used one time. The enforcement of the preference would be a short, quick trip to the courthouse. The Department of Administration would be given the authority to adopt rules.

Senator Mazurek said he feels SB 2 is a fair compromise.

HOUSE BILL 8

REPRESENTATIVE BOB PAVLOVICH, of Butte, explained that HB 8 is an exact bill of SB 2 and felt that Senator Mazurek had explained the points thoroughly with SB 2.

SENATE BILL 3

SENATOR GARY AKLESTAD, of Havre, introduced SB 3 which would help cut down on litigations and still give preference to those who are deserving of a preference. Those who would benefit

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
December 13, 1983

The first executive session of the Senate Judiciary Committee during the First Special Session of the 48th Legislature was held on December 13, 1983, in Room 325 of the State Capitol. The meeting was called to order at 8:05 a.m. by Chairman Jean A. Turnage.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL 2:

Senator Joe Mazurek, Chairman of Subcommittee No. 4, the joint interim subcommittee studying the employment preference act, distributed copies of a summary (Exhibit No. 1) of Senate Bill No. 2 (Exhibit No. 2), the subcommittee's bill to revise this act. Senator Mazurek explained the subcommittee's bill section by section, and answered committee members' questions as they arose during his explanation. It was decided that amendments would not be proposed until Senator Mazurek completed his explanation of the bill. Those provisions of the bill on which the members raised questions during the explanation are as follows:

"Active duty". Senator Berg asked for an explanation of "full-time duty other than for training". Senator Mazurek explained that the bill was drafted to grant the preference to persons serving on full-time active duty in the armed forces and to exclude those in the reserves or national guard who would be considered temporarily serving on active duty while in training. He further explained that if a person enlisted or was drafted into the service, he would be classified as serving on active duty, while service in the national guard or reserves is considered active duty for training. Senator Mazurek explained that this distinction is used by the federal government. He stated that present law provides that 180 consecutive days of service is considered "full-time active duty".

Purpose section. Senator Halligan said that veterans and others testified at the joint House and Senate hearing on December 12 that the term "recognition" would be more appropriate than "reward" when stating the purpose of awarding the preference. Senator Mazurek said that the intent of the subcommittee was to

reward veterans for service, and also to assist them in becoming reintegrated into the workforce. He said he would have no objection to amending the bill to include "recognition" as one of the purposes for the preference.

"Disabled veteran". Senator Mazurek explained that the federal government uses a 30% degree of disability to classify a veteran as "disabled", and he explained that this same degree of disability was adopted by the subcommittee. He said that the present law considers a disability of zero to 100% as qualifying a person for a lifetime preference. Senator Halligan noted that testimony at the joint House and Senate hearing on December 12 indicated that the Department of Social and Rehabilitative Services (SRS) has stricter standards for determining disability of handicapped persons than the Veterans' Administration uses for classifying disabled veterans. Senator Mazurek said that that is true. He added that the subcommittee's bill was drafted to assist handicapped persons who, because of their handicap, have suffered from discrimination when seeking employment or whose handicap affects a major life activity such as hearing or seeing.

"Honorable discharge". Senator Crippen asked if a person discharged from the service because of medical problems would be considered to be honorably discharged. Senator Mazurek said that the subcommittee received testimony that a medical discharge is considered an honorable discharge. Senator Crippen asked if this would apply to a person with mental problems, and Senator Mazurek said that this issue was not addressed during the subcommittee's hearings.

"Advance in employment". Senator Turnage questioned why the term "advance in employment" is contained in the definition of "handicapped person" since the bill does not provide for application of the preference to promotions. Senator Mazurek explained that the definition of "handicapped person" provides that the physical impairment must be one that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment. He explained that SRS takes employment history as well as physical impairment into consideration when certifying a person as disabled, which means that if a person has been successfully employed, he is excluded from

certification as "handicapped" by SRS. He said that the subcommittee expressed serious concern that a handicapped person gaining an entry level position could be precluded from advancement because of SRS' policy; therefore, "advance in employment" was included in the definition. Senator Mazurek said that the subcommittee also objected to SRS' policy of requiring a handicapped person to appear annually to reapply for certification.

Education system. Senator Galt asked if the definition section would be the appropriate place to include community colleges and vocational technical (vo-tech) centers as elements of the education system that would be subject to the preference. Senator Mazurek said that those institutions would have to be included in the definition of "public employer" in order to make them subject to the preference.

Senator Mazurek noted that "school district" was specifically excluded from the definition of "public employer". He explained that the subcommittee felt that because the majority of school districts are small, they would not have the resources to defend themselves if faced with court challenges to their hiring procedures. Senator Mazurek said that the subcommittee also felt that school districts would have a difficult time in developing job descriptions for teacher applicants who are already certified and therefore qualified to teach. Senator Mazurek further explained that the school districts' position is that they have never been subject to the preference act and therefore should not be subject to it now.

Senator Mazurek said that the subcommittee felt that the university system is large enough and sophisticated enough that the preference could be applied there.

With regard to vo-tech centers, Senator Mazurek said that an attorney general's opinion has defined vo-tech centers as "state agencies", and therefore they would be subject to the preference. Senator Galt said that he will propose an amendment later on regarding the university system, community colleges, and vo-tech centers.

"Initial hiring". Senator Halligan asked Dennis Taylor, Administrator of the state's Personnel Division, if it is a common practice among state agencies to hire from within the agency. Mr. Taylor

replied that the hiring authority of a state agency makes the decision on whether to hire from within, whether to post the position with the job service, or whether to publicly advertise the job. He further explained that sometimes collective bargaining agreements provide for hiring from within. He added that state executive branch agencies are encouraged to fill entry level positions through the job service.

"Public employer" and "initial hiring". Senator Crippen referred to the definition of "public employer" and "initial hiring" and asked Senator Mazurek if, considering those definitions, a position such as clerk to a supreme court justice would be subject to the preference. Senator Mazurek responded that he did not believe such a position would be subject to the preference because, while the preference would generally apply to clerical and other such positions within the judicial branch, the position of law clerk would fall within the definition of "employment as an elected official's immediate secretary, legal advisor, or administrative, legislative, or other immediate or first-line aide", which is an exclusion to the definition of "position". Senator Crippen asked if anyone from the judicial branch testified before the subcommittee, and Senator Mazurek replied that no one did.

"Court reporter". Senator Turnage asked if a court reporter would be covered under the definition of an elected official's immediate staff. Senator Mazurek said that he believes that position would be considered to be an immediate aide. Senator Turnage said that he believed the position of court reporter should be addressed specifically in the bill.

Employees of the legislature. Senator Turnage asked if employees of the legislature are subject to the preference, and Senator Mazurek said that such employees are hired on a temporary basis and therefore would not be eligible for the preference.

Local government department head. Senator Turnage asked if a sheriff would be considered a local government department head. Senator Mazurek said that since a sheriff is an elected official, a sheriff and his secretary would probably be excluded from application of the preference; sheriff's deputies would be eligible for the preference.

Vietnam conflict dates. Senator Crippen questioned the bill's dates of August 5, 1964 to May 7, 1975 for the duration of the Vietnam conflict. Senator Mazurek said that those are the dates used by the U.S. Department of Defense. He said that the subcommittee made a policy decision to reward veterans and assist them with reintegration into the workforce by granting the preference to those who served on active duty during a war, a declared national emergency, or in a campaign or expedition for which a campaign badge was authorized by the federal government. He said that the term "active duty" would apply to all veterans who served during a combat era such as the Vietnam conflict, regardless of whether they actually served in Vietnam; however, those serving in a campaign such as Grenada or Lebanon would actually have to have served in those areas. Senator Crippen said that he feels there may be many veterans who should be recognized in addition to those included in the bill. He mentioned those persons serving in the demilitarized zone in Korea and said that they are serving in a hostile area, and yet would be excluded from the bill's definition of "veteran". He said that he believes they would be more entitled to the preference than a veteran who served during a time of conflict but who did not actually serve in a conflict. Senator Mazurek said that a person serving in Korea would be entitled to the preference because a campaign ribbon is awarded for service there. He said that the subcommittee made a conscious decision of who to include and who to exclude in the definition of "veteran", and no one testified during the public hearings that the preference should apply to all veterans. He added that even the representatives of veterans' organizations suggested limiting eligibility for the preference to conflict-era veterans.

Military retirement. Senator Turnage questioned the section excluding from the definition of "veteran" a person receiving retirement pay based on length of military service. He asked if that would exclude someone receiving a disability retirement. Senator Mazurek explained that this provision applies only to retirements based on length of service and that medical retirements are not affected.

"Initial hiring". Senator Turnage asked if large state agencies such as the Department of Revenue or the Department of Highways could conceivably exclude preference-eligible individuals from almost all significant initial hirings by hiring from within.

Senator Mazurek said that is possible but that it seems unlikely that all initial hirings would come from within. He added that hiring from within is a matter of administrative discretion.

Ranking of preferred groups. Senator Mazurek said that the subcommittee decided that disabled veterans should receive the highest ranking for preference eligibility but decided not to prioritize other eligible groups. Senator Crippen remarked that this seems to create a preference within a preference, and Senator Mazurek said that that is true. He said that there was strong agreement among members of the subcommittee to grant disabled veterans the highest preference.

Eligibility requirements. Senator Mazurek said that he wanted to make it clear that the subcommittee was aware that it may be difficult to enforce some of the eligibility requirements of the bill, particularly the U.S. citizenship requirement and the requirement of continuous one-year residency within the state before application for employment. He said that there seemed to be a lot of public support to include those two eligibility requirements, and therefore the committee decided to include them even though it was recognized the provisions could be challenged in court. He added that the Montana Constitution gives the legislature authority to grant special privileges to Montana's veterans, and that this authority could cover the U.S. citizenship and one-year residency requirements; however, those requirements could be challenged under the right-to-travel provision of the U.S. Constitution. Senator Mazurek said that the 30-day residency requirement before applying for employment in a city, town, or county was included at the request of various local governments.

Duration of employment preference. Because the duration of the preference had been such a controversial issue during the public hearings on the bill, Senator Mazurek gave particular emphasis to his explanation of this section of the bill. He stated that the bill provides that a handicapped person, the spouse of a handicapped person, a disabled veteran, or the spouse of a disabled veteran are eligible for the preference for as long as the disabling condition exists; an unremarried surviving spouse qualifies as long as he or she remains unmarried. He explained that the original version of the subcommittee bill granted the preference to veterans for a period of five years

following discharge from the service; however, this was felt by some groups to be too short a time for some veterans to become reintegrated, and the subcommittee then changed the duration to ten years. Testimony at subsequent hearings then indicated that this was too long a period, and the duration section was changed again to provide that a veteran would be qualified for the preference for life, but would be limited to a one-time use of the preference.

"Handicapped person" - mental impairment. Senator Turnage noted that the definition of "handicapped person" does not include the handicap of mental impairment, and he said he felt that the bill should be more specific on whether or not mental impairment is to be included as a condition that would classify a person as a "handicapped person" in the definition section. Senator Mazurek agreed that the bill should be made more specific in this regard. Senator Halligan asked how the question of mental impairment would apply to a disabled veteran. Senator Mazurek said that the subcommittee did not feel that a distinction needed to be made between physical and mental impairment as applied to disabled veterans because a disabled veteran, as defined in the bill, is always eligible for the preference. He said, however, that the subcommittee voted to exclude "mental impairment" from the definition of "handicapped person". Senator Turnage suggested that this matter be discussed further later in the meeting.

At 10:00 a.m. Senator Turnage was called to attend another meeting, and Vice Chairman Bruce Crippen assumed the chair. He recessed the meeting until 10:20 a.m.

Statement of intent. Senator Mazurek explained the provisions of the statement of intent. He noted that the subcommittee requested that the Department of Administration insure that there is adequate public participation in the rulemaking process because testimony at public hearings on the bill indicated that adequate notice wasn't given to the public when administrative rules were adopted by the Department of Administration following the Crabtree decision. Senator Mazurek also explained that the statement of intent has been drafted to provide that SRS cannot deny certification to a handicapped person because that person holds a job, nor can SRS require a person with a

permanent handicap to come in for yearly recertification.

General committee discussion.

Senator Shaw asked Senator Mazurek for an explanation of testimony at one of the public hearings which indicated that the preference act had never been used as a "tie breaker". Senator Mazurek said that there was testimony from veterans that an absolute preference was necessary because a subjective decision could always be made that two applicants were not "tied". He explained that that is why the committee bill provides that a public employer is required to demonstrate, based on the job description and selection techniques used, that there is an obvious difference in the qualifications of applicants.

Senator Crippen asked what would happen to a person hired for a job who is then let go because a preference-eligible person claimed the job. Dennis Taylor said that he is not aware that any public hiring authority has been confronted with this situation. He added that other than the Crabtree case, all preference suits are still on appeal. Mr. Taylor said that he hopes the legislature will address this situation rather than leave it to the courts to decide.

Committee amendments

Senator Crippen said that committee members wishing to do so may propose amendments at this time, but he suggested that action on amendments be delayed until Chairman Turnage and Senator Halligan return to the meeting.

David Niss, Counsel to the Committee, presented an amendment proposed by Representative John Phillips (Exhibit No. 3) and two amendments (Exhibits 4 and 5) proposed by other unidentified persons. The three amendments are as follows:

1. Honorable discharge. Page 2, lines 8 and 9. Strike "under honorable conditions" and insert "by honorable discharge". Senator Mazurek explained that Representative Phillips testified at the public hearing on December 12 that the U.S. Department of Defense has five levels of discharge: "honorable", "under honorable conditions", "under conditions other than honorable", "bad conduct", and "dishonorable". Senator Mazurek said that the intention of the subcommittee was

to grant the preference to any veteran who had served honorably. He explained that the U.S. Department of Defense classifies veterans discharged under general or administrative discharges as having served honorably, and those veterans are therefore discharged "under honorable conditions". He said that the proposed amendment will limit application of the preference to those veterans who received an honorable discharge. Senator Daniels MOVED that the amendment be tabled, and the motion carried.

Senator Turnage returned to the meeting at 10:40 a.m. and assumed the chair.

2. Military retirement. Page 6, lines 21 through 23. David Niss explained that this amendment was proposed to prevent "double dipping" into two or more government retirement systems, excluding social security. The amendment would exclude from the definition of "veteran", and therefore from the list of persons entitled to the preference, an individual who is receiving a government retirement pension based on length of military service. Mr. Niss noted that the amendment would allow a person receiving a medical retirement allowance to claim the preference. Lois Menzies, Legislative Council staff researcher for the subcommittee, explained that the subcommittee's intent was to grant the preference to a person who was involuntarily required to retire from the service because of a medical disability but to exclude from the preference those career persons who retired after twenty years of service. Senator Turnage suggested the following language for the amendment: Following "include a" on page 6, line 21, strike line 21 through "service on line 23 and insert: "retired member of the United States armed forces who is eligible for or receiving a military retirement allowance based on length of service and does not include any other retired member of a public retirement system, except social security, that is supported in whole or in part by tax revenues". Senator Mazurek MOVED that this amendment be adopted, and the motion carried.

3. Education system. David Niss explained that the third suggested amendment would be to include all educational systems within the bill but to exclude from the bill certain positions within the educational systems. The amendment was to insert "teacher" on line 25 of page 5, which would have the effect of excluding the position of teacher from application of the

preference; on page 5, line 23, delete "a school district,", which would include school districts in the definition of "public employer" and therefore cause school districts to be subject to the preference; and on page 6, following line 6, include a definition of "teacher".

Senator Mazurek said that if teachers are to be [illegible] the bill may have to be amended to provide for specialists such as speech therapists and counselors who are certified differently than teachers. He asked that Chip Erdmann, Montana School Boards Association (MSBA), respond to the proposed amendment. Mr. Erdmann said that the MSBA maintains that school districts should be totally excluded from application of the preference; however, if the committee should decide to apply the preference to all school district employees except teachers, administrators, and specialists, those teaching positions will have to be clearly defined because they are certified differently. Mr. Erdmann said that he has some concern about the contract issue because many school districts contract with most of their employees, and if the bill should pass as written, school districts will have breach-of-contract suits filed against them. He suggested that if school districts are to be made subject to the preference, residency requirements for school districts should be included in the bill.

The committee recessed at 11:10 a.m. for a Democrat caucus and reconvened at 3:10 p.m.

Montana Human Rights Act. David Niss stated that Ann McIntyre, Director of the Montana Human Rights Commission, suggested that the bill be amended so that it will not be in conflict with the provisions of the Montana Human Rights Act. Mr. Niss explained that this could be accomplished by deleting sections 12 and 13 and inserting new sections to conform the bill to the Montana Human Rights Act. The title and codification sections would also be amended to conform them to the language in the new sections 12 and 13. Senator Berg MOVED that the bill be so amended, and the motion carried.

Education system. Senator Galt proposed an amendment which would remove all elements of the education system from the application of the preference. It was suggested that if this amendment were adopted, it would

not be necessary to discuss any further the third amendment which was being discussed prior to the recess.

Senator Mazurek was delayed in attending this portion of the meeting, and Chairman Turnage suggested that committee action on controversial amendments be withheld until Senator Mazurek's return. Senator Galt withdrew his motion for consideration later in the meeting.

Purposes. Senator Halligan stated that he feels veterans have already been granted many rewards and proposed that section 2 of the bill be amended to state that one of the purposes of the preference act is to "recognize" veterans, rather than "reward" them. Senator Halligan MOVED that on page 1, line 17 following "are to", "reward" be stricken and "recognize" be inserted. The motion carried, Senator Daniels voting "no".

Mental impairment. Senator Halligan said that he intended to propose an amendment to include "mental impairment" in the definition of "handicapped person", and he asked Jim Reynolds, attorney for Vivian Crabtree, to address the committee on this point. Mr. Reynolds said it is a policy decision for the state to decide if it wishes to have mentally impaired persons eligible for the preference. He said that a distinction has to be made between "mental illness" and "mental retardation". He said that the State of Montana has spent a lot of effort and money in bringing many retarded persons to the point of being employable, and if those persons were to be excluded from being eligible for the preference, all of the state's efforts in this regard would be in vain. Mr. Reynolds said that retarded persons especially need help because their disability is obvious, and they therefore have significant barriers to employment. Regarding the mentally ill, Mr. Reynolds explained that a veteran who is mentally ill, and therefore certified as 30% disabled by the Veterans' Administration, would be eligible for the preference under the provisions of the bill; however, a civilian having the same disability would be excluded from the preference. He said he believes that this could lead to an "equal protection" challenge should the bill become law.

Senator Halligan asked Mr. Reynolds about testimony in public hearings regarding SRS' certification of the

mentally impaired for vocational rehabilitation assistance. Mr. Reynolds said a problem arises in the certification process because there are fairly standardized testing procedures to certify mental retardation, while mental illness is harder to quantify. He said he has heard the statistic quoted that approximately 5% of the certifiably disabled are classified as "mentally impaired". He noted that many cases of mental impairment could be considered to be physical in nature and said this would be particularly true of persons with Down's syndrome or an injury to the brain. He said that virtually all mental impairment has some physical basis.

Senator Mazurek returned to the meeting at this time, and Chairman Turnage reviewed committee actions taken during Senator Mazurek's absence.

Senator Berg MOVED that "mental impairment" be included in the definition of "handicapped person" by the following amendment: On page 3, line 6 insert "or mental" following "physical". Senator Mazurek asked if the committee had discussed alcoholism or drug addiction when it discussed including "mental impairment". Chairman Turnage said inclusion of these conditions could lead to a lot of lawsuits. Senator Halligan noted that all job applicants would have to meet the standards of "substantially equal".

Chairman Turnage called for a vote on Senator Berg's motion, and the motion failed 3 to 5.

Education system. Chairman Turnage then called for discussion on Senator Galt's previously proposed and then withdrawn motion to exclude education "across the board". Senator Galt said he wished to MOVE the same amendment, the Chairman called for the vote, and the motion passed 5 - 3.

Priority for preference. Senator Halligan said he believed that handicapped persons should have the same preference as disabled veterans and MOVED to amend the bill on page 7, line 19 to insert "or handicapped person" following "disabled veteran". Senator Mazurek said he would resist the motion because the subcommittee could reach no agreement on prioritizing the five preferred groups. He added that traditionally, disabled veterans have been given the highest preference, and if an attempt is made to place handicapped persons on the same basis as disabled

veterans, then the other groups will have to be prioritized, which could be difficult.

Senator Halligan invited Vivian Crabtree to go on record with her views on this issue. Ms. Crabtree said that many handicapped persons have acquired their disability through birth defects or incidents that occurred before they were eligible to become veterans. She stated that because of this, handicapped persons are denied the opportunity to compete for the highest preference. She said that the basic issue is one of equality. She referred to Senator Mazurek's remark about "tradition" and said that traditionally the handicapped have been discriminated against for many years. She said that her remarks reflect the position of the Governor's Committee on Employment of the Handicapped.

The Chairman called for a vote on Senator Halligan's motion, and the motion failed 2 - 6.

Retroactivity. Senator Galt proposed an amendment at the request of the East Helena School Board and called on Woody Wright, chairman of that board, to explain the amendment.

Mr. Wright said that in September of 1983 it was necessary for his board to hire five certified teachers for tutorial positions. He said that the board elected to follow the Crabtree decision and applied the veteran's preference to the applications. He said that out of 25 applications, seven applicants claimed the preference, and five of those applicants were hired. The board was subsequently sued for damages by one of the unsuccessful applicants. Mr. Wright stated that he had testified before Subcommittee No. 4 to explain the East Helena School Board's dilemma. He said the subcommittee considered three different forms of retroactive application and decided to include the least restrictive retroactivity provision in the bill. Mr. Wright said that to remedy the East Helena situation, the bill must include the most restrictive repealer, which is the one being proposed in Senator Galt's amendment. He explained that Senator Galt's amendment would repeal sections 10-2-201 through 10-2-206, and the repeal would be retroactive in barring any claim for violation or application of the preference law as it is now written. Mr. Wright said that the effect of the amendment would be that if an individual's claim has not gone to judgment, then that

individual's rights to pursue his claim would be cut off.

Senator Mazurek said that he is concerned about the amendment because while it addresses East Helena's situation, it could invite an immediate challenge to the act. He asked Mr. Wright to explain why it wouldn't be better to amend the bill on page 14, line 24, by inserting "or application" following "violation", which would provide that the claim could still be pursued, but the only remedy available would be reopening the hiring process. He said that retroactively barring a claim would open the issue of vested and nonvested rights. Mr. Wright said that he understands that this is a difficult policy decision for the committee to make, but he said that he believes such a decision would be legally justifiable. He said that the amendment would not only apply to the East Helena situation but also to those local government entities that followed the law in good faith.

Senator Galt MOVED his amendment.

Chairman Turnage asked Senator Mazurek if he had further questions about the proposed amendment. Senator Mazurek said that he asked Mr. Wright to explain the amendment because they had previously discussed other avenues. Senator Mazurek asked John MacMaster, Legislative Council staff attorney to the subcommittee, to explain the retroactivity section of the Legislative Council's legal memo on the preference issue as that section applies to a claim of violation and a claim that has already been reduced to judgment. John MacMaster said his recollection of the memo was that it was fairly clear that a claim that had not gone to judgment could be barred. Senator Turnage asked if a distinction could be made between a claim that might have arisen but was not yet filed and a claim that had not yet been reduced to judgment. John MacMaster said he believed either could be barred.

Senator Mazurek said that there would be a question, in instances such as the Hunt or Jensen decisions, as to whether those are district court judgments that are final at this point because there has been a preliminary determination by the district court. Senator Mazurek read from the legal memo:

> ... it is unclear whether the amendment [to amend the preference statute retroactively]

> may be applied to cases in which a judicial order requiring compliance with the existing law has already been issued, since in such a case it may be held that the right has already been consummated and is therefore vested.

Senator Mazurek continued, "So we would have to go one step further and say not only those claims which are pending [will be barred] but [also] those in which, in Great Falls and Helena, ... there have already been district court judgments entered. Can we go back and bar those?" Senator Turnage said he did not think the legislature could make such a provision. Senator Mazurek said he believes Senator Galt's amendment would be doing just that, and he thought it was questionable whether that would be legally defensible.

Senator Turnage said that he didn't know if as a matter of policy the committee should so amend the bill to provide for the retroactive barring of a claim, whether or not that claim has been reduced to a final judgment.

Senator Galt asked Senator Turnage where he would include such a provision, and Senator Turnage said that following "that has not been reduced to judgment", "whether or not the judgment is final" could be inserted. Senator Galt said that would be agreeable with him. Senator Turnage said that he was just trying to address the possible questions that would arise, and whether this committee should make a policy decision on the retroactivity question. He said that if the language is left as it is, it does not address claims that arose but had not yet been filed. Senator Mazurek said that those claims would have to be litigated, but the only remedy would be to reopen the hiring process.

Senator Turnage said that after the House acts on the bill, this question will no doubt be resolved in a conference committee. He asked Senator Galt if he wanted to include the suggested language, and Senator Galt said he would MOVE his amendment "as amended". Senator Mazurek said that the applicability section must also be amended, and David Niss said that subsections 3(a), (b), and (c) of section 16 need to be stricken because they would be totally inconsistent with the added language.

Senator Galt's motion passed, Senators Halligan and Shaw voting "no".

Position of court reporter. Senator Mazurek MOVED that page 5, line 3 be amended to insert "court reporter," following "advisor,". This amendment excludes from application of the preference the position of court reporter because that position is considered an immediate aide to a judge. The motion carried.

Duration. Senator Daniels questioned section 7, page 9, line 4, which grants veterans a life-time eligibility to the preference but limits the preference to a one-time use. He said that because veterans often have difficulty adjusting to civilian life, or because a veteran may use the preference to gain a job for which he is unsuited, the one-time use provision seems to him to be too strict. Senator Mazurek said that one problem with this provision would be the recordkeeping involved in accounting for when and where the preference is used. He said this provision was included "at the last minute" because the subcommittee was having difficulty establishing a time limit; it had originally been established as 5 years, then was changed to 10 years with a 5-year grandfather provision. Senator Daniels said he had no alternative to offer, but he felt that the one-time use provision diluted the whole bill.

Senator Turnage asked Senator Mazurek what the arguments were for limiting use of the preference to one time. Senator Mazurek said that it was felt to be unfair that a preferred person could claim the preference in every job for which he applied throughout his lifetime. He said that the subcommittee felt that once a preferred person successfully finds a job, he is considered to be reintegrated into the work force, and the preference should no longer be necessary. He said the argument for a time limit was that it would allow a preferred person to use the preference as many times as necessary until he was reintegrated into the work force. He said that the subcommittee was persuaded that a five-year time limit was too short to allow a veteran to get a college education and become successfully readjusted, and therefore the ten-year time limit was adopted. Senator Daniels said that he didn't think the ten-year limit was a good idea either, but that he did not wish to offer an amendment.

Seasonal employment. Senator Halligan said that seasonal employment could cause a problem because a veteran could use his one-time preference to gain a seasonal job which would then run out. He MOVED that

on Page 9, line 5, "permanent" be inserted following "obtained a". Senator Mazurek explained that a permanent job is defined in the bill as one lasting longer than 9 months. The motion carried.

Senator Mazurek MOVED Senate Bill 2 "Do Pass as Amended", and the motion carried unanimously.

Statement of intent

Senator Turnage suggested that the term "tie-breaker" be deleted from page 1 of the statement of intent because that term is inconsistent with the language in the bill. Senator Mazurek MOVED the amendment and it the motion carried.

Senator Berg MOVED adoption of the statement of intent as amended and the motion carried.

Additional amendment to bill

Posting requirements. Senator Turnage said that if no member objected, he would like to return to consideration of the bill and add an amendment to provide that the hiring authority's posting requirements be clarified. Senator Mazurek MOVED that page 9, lines 15 and 16 be amended to read: "A public employer shall, by posting ~~and~~ or on the application form give notice of the preferences". The motion carried.

The meeting adjourned at 4:40 p.m.

Jean A. Turnage

JEAN A TURNAGE
Chairman, Judiciary Committee

JUDIC/Minutes 12/13

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 12/13/83
1st Special Session

NAME	PRESENT	ABSENT	EXCUSED
Berg, Harry K. (D)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Daniels, M. K. (D)	✓		
Galt, Jack E. (R)	✓		
Halligan, Mike (D)	✓		
Hazelbaker, Frank W. (R)	✓		
Mazurek, Joseph P. (D)	✓		
Shaw, James N. (R)	✓		
Turnage, Jean A. (R)	✓		

EXHIBIT NO. 1

December 13, 1983

Bill Summary

SB2 (LC1)

By request of the Joint Interim Subcommittee No. 4

Section 1. (Short title). This act is called the "Montana Veterans and Handicapped Persons Employment Preference Act".

Section 2. (Purposes). The purpose of granting employment preference to veterans is to reward and to rehabilitate while the purpose for handicapped persons is to recognize past employment discrimination and to rehabilitate.

Section 3. (Definitions). This section identifies the following groups as preference eligible:

1. Disabled veterans. Those persons who:

   -- served on active duty;

   -- have been separated from service under honorable conditions; and

   -- suffer a service-connected disability of 30% or more as determined by the U.S. Veterans Administration.

2. Veterans. Those persons who:

   -- served on active duty during war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized; and

   -- have been separated from service under honorable conditions.

3. Eligible spouses. Those persons who are:

   -- unremarried surviving spouses of veterans who died while on active duty or whose death resulted from service-connected disabilities;

   -- spouses of veterans determined by the Veterans Administration to have 100% service-connected disabilities who are unable to use their employment preference because of their disabilities;

   -- spouses of persons determined by the U.S. government to be missing in action or prisoners of war; and

-- spouses of handicapped persons determined by SRS to have 100% disabilities who are unable to use their employment preference because of their disabilities.

4. Handicapped persons. Those persons who:

-- have a physical impairment limiting one or more major life activities and limiting ability to obtain, retain, or advance in employment; and

-- are certified by SRS.

The definition section also gives a detailed explanation of what "initial hiring" means, identifies those positions covered by preference and those employers who must apply the preference, and defines the term "substantially equal qualifications".

Section 4. (Employment preference in initial hiring). This section describes the nature of the employment preference. It provides that for initial hiring only, a public employer must hire a preference eligible applicant over any nonpreferred applicant holding substantially equal qualifications. Moreover, an employer must hire a disabled veteran over any other preferred applicant with substantially equal qualifications.

Section 5. (Eligibility requirements). No veteran (nondisabled or disabled), eligible spouse, or handicapped person may receive preference unless he:

-- is a U.S. citizen;

-- meets a 1-year state residency requirement;

-- meets a 30-day local residency requirement if applying for a municipal or county job; and

-- meets the requirements necessary to perform the job.

Section 6. (Certification of handicapped persons). This section requires SRS to certify persons as handicapped for the purpose of employment preference.

Section 7. (Duration of preference). This section provides that:

-- A handicapped person, spouse of a handicapped person, disabled veteran, and spouse of a 100% disabled veteran may use the preference for as long as the disabling condition exists;

-- A nondisabled veteran may use the preference for life,

but once he has obtained a job because of application of the preference, he may not use the preference again;

-- A surviving spouse of a veteran whose death was service-connected may use the preference for as long as the spouse remains unmarried; and

-- A spouse of a person who is an MIA or POW may use the preference for as long as the person is missing in action or a prisoner of war.

Section 8. (Enforcement of preference). The enforcement procedures for the act are as follows:

-- A public employer must inform job applicants of the existence of the preference.

-- An applicant who feels that he is entitled to preference must claim the preference in writing before the filing deadline for applicants passes.

-- If any of the applicants for a job claim preference, the employer must send each applicant a written notice of his hiring decision.

-- Within 30 days after receiving the notice, an unsuccessful applicant who is preference eligible may ask the employer for an explanation of his hiring decision.

-- The employer must respond within 15 days after receiving the request for the explanation.

-- An applicant may also file a petition in district court within 90 days after receiving notice of the hiring decision.

-- Once a petition is filed, the judge must order the employer to appear in court not less than 10 days or more than 30 days after the petition was filed to show cause why the applicant was not hired for the position.

-- If the employer cannot make a clear showing that the applicant was not substantially equally qualified with the person hired, the judge must order the employer to reopen the selection process for the position and to pay attorney fees and court costs.

Section 9. (Adoption of rules.) This section grants rulemaking authority to the Department of Administration. The department must adopt rules for implementing the act and must consult with SRS before adopting rules governing certification of handicapped

persons. Rules adopted by the Department of Administration apply to all state and local public employers.

Section 10. (Conflicts with federal law). This section provides that if application of the preference conflicts with federal laws or regulations concerning certain work or jobs, the preference will not be applied.

Section 11, 12, and 13. (Amendments to existing law). These sections amend 10-2-402, 49-3-103, and 49-3-201, MCA, to eliminate conflicts between current law and the preference act.

Section 14. (Repealer.) This section repeals the current preference law (10-2-201 through 10-2-206, MCA).

Section 15. (Severability.) This section provides that if a court finds any part of this act unconstitutional or invalid, only such parts are void; the remainder of the act is valid.

Section 16. (Effective date -- applicability -- saving clause). This section provides that:

-- The act is effective on passage and approval;

-- The act applies only to positions filled after the effective date; and

-- A claim for violation under the old law (10-2-201 - 12-2-206, MCA) must be filed within 60 days after the effective date of the act; such claim is governed by the provisions of the old law but the only relief that may be granted is the relief outlined in section 8 of the act (reopening section process and granting of attorney fees and court costs).

SENATE BILL NO. 2

INTRODUCED BY MAZUREK

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; AMENDING SECTIONS 10-2-402, 49-3-103, AND 49-3-201, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

NEW SECTION. Section 2. Purposes. The purposes of [sections 1 through 10] are to reward veterans for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans and handicapped persons.

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual who:

(a) served on active duty;

(b) has been separated from service under honorable conditions; and

(c) suffers a service-connected disability determined by the United States veterans administration to be 30% or more disabling.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department

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EXHIBIT NO. 2
December 13, 1983

of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

(iv) a unit, as defined in 20-25-201, for a position

within the Montana university system;

(v) the office of commissioner of higher education for a position within that office;

(vi) a college for a position within that college;

(vii) a center or program for a position within the postsecondary vocational-technical education system;

(viii) a city or town for a municipal position, including a city or municipal court position; and

(ix) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)(ix) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)(ix) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, college, including a community college, postsecondary vocational-technical center or program, university, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

(9) "Under honorable conditions" means a discharge or separation from active duty characterized as under honorable conditions. The term includes honorable discharges and general discharges but does not include dishonorable discharges or other administrative discharges characterized as other than honorable.

(10) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense; and

(ii) has been separated from service under honorable conditions.

(b) The term does not include a person receiving retirement pay from the United States based on length of military service.

(11) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and

ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

NEW SECTION. Section 5. Eligibility requirements. No

veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

(1) he is a United States citizen;

(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;

(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and

(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

NEW SECTION. Section 6. Certification of handicapped persons. The department of social and rehabilitation services shall certify persons as handicapped for the purpose of employment preference as provided in [sections 1 through 10].

NEW SECTION. Section 7. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling

condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for life. However, once he has obtained a position because of the application of the employment preference, he may not use the preference again.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment preference for as long as the person is missing in action or a prisoner of war.

NEW SECTION. Section 8. Enforcement of preference. (1) A public employer shall, by posting and on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim is a complete defense to an action under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each

applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. The public employer has the burden of making a clear showing that the applicant was not substantially equally qualified with the person hired.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or

on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i), the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local

as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10]."

Section 12. Section 49-3-103, MCA, is amended to read:

"49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap;

(a) when based on the preference provided in [sections 1 through 10];

(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or

(c) where the differentiation is based on reasonable

factors other than age;

(2) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) from discharging or otherwise disciplining an individual for good cause."

Section 13. Section 49-3-201, MCA, is amended to read:

"49-3-201. Employment of state and local government personnel. (1) State Except as provided in [sections 1 through 10], state and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training

programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall insure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to insure utilization of minority group persons."

NEW SECTION. Section 14. Repealer. Subject to section 16(3)(a) of this act, sections 10-2-201 through 10-2-206, MCA, are repealed.

NEW SECTION. Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 16. Effective date -- applicability -- saving clause. (1) This act is effective on passage and approval.

(2) Except as provided in subsection (3)(b), this act applies only to positions that are filled after the effective date of this act.

(3) (a) Subject to the applicable statute of limitations and to subsection (3)(c), a claim for violation of 10-2-201 through 10-2-206, whether or not it is pending

in court on the effective date of this act, may be pursued under and must be governed by 10-2-201 through 10-2-206.

(b) However, the only relief that may be granted on a claim described in subsection (3)(a) is that provided in section 8(4)(c)(iii) of this act, and the court may grant no other relief, including that provided in 10-2-206 or any judicial construction of 10-2-206.

(c) A claim under 10-2-201 through 10-2-206 must be filed within 60 days after the effective date of this act.

-End-

Statement of Intent

_____ Bill No. _____ [LC 1]

A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied as a "tie-breaker" among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a public employer.

A statement of intent is also required for this bill because section 9 requires the department of administration to adopt rules implementing sections 1 through 10 and to consult with the department of social and rehabilitation services in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to sections 1 through 10.

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the following matters and take into account the following considerations.

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a veteran, disabled veteran, handicapped

person, or eligible spouse, and the requisite residency and citizenship requirements. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants and that once an applicant has substantially complied with the rules, a public employer should make every reasonable attempt to verify the existence of the preference.

(2) Handicapped persons -- certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical impairment that substantially limits one or more major life activities, and outline in what instances a physical impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a combination of a statement of general principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Separations and discharges. The legislature intends the rules to apply federal law and further define separations under honorable conditions and the various types of discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the selection process for a job should a court order the selection process reopened, and include a method of giving notice to those who applied for the job informing them of the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10.

EXHIBIT NO. 3
December 13, 1983

PROPOSED AMENDMENTS TO SENATE BILL 2

1. Page 2, lines 8 and 9.
Strike: "under honorable conditions"
Insert: "by honorable discharge"

2. Page 6, lines 7 through 12.
Strike: subsection (9) in its entirety
Renumber: subsequent subsections accordingly

3. Page 6, lines 19 and 20.
Strike: "under honorable conditions"
Insert: "by honorable discharge"

DAVID4/ee/Proposed Amendments to SB 2

EXHIBIT NO. 4
December 13, 1983

PROPOSED AMENDMENTS TO SENATE BILL 2

1. Page 6, lines 21 through 23.
Following: "include a" on line 21
Strike: line 21 through "service" on line 23
Insert: "retired member of the United States armed forces who is receiving a military retirement allowance other than a medical retirement allowance and does not include any other retired member of a public retirement system, except social security, that is supported in whole or in part by tax revenues"

DAVID4/ee/Prop Amendments to SB 2

PROPOSED AMENDMENTS TO SENATE BILL 2

1. Page 4.
Following: line 25
Insert: "(b) a teacher;"
Renumber: subsequent subsections accordingly.

2. Page 5, line 23.
Strike: "a school district,"

3. Page 6.
Following: line 6
Insert: "(9) "Teacher" means any employee of a school district, community college district, college, or unit, as defined in 20-25-201, of the Montana University system, who is a member of its teaching, supervisory, or administrative staff."
Renumber: subsequent subsections accordingly.

DAVID4/ee/Amendments to SB 2

EXHIBIT NO. 6
December 13, 1983

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November 10, 1983

TO: Joint Interim Subcommittee Number 4

FROM: Committee Legal Staff

RE: Employment Preference Law Constitutional Issues

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I. INTRODUCTION

This legal memorandum covers federal and state constitutional issues relating to veterans' and disabled persons' state and local government employment preference laws. Policy questions and issues of statutory interpretation or construction are not discussed, nor are conflicts with other laws. The committee should bear in mind in drafting any new legislation that there will undoubtedly be conflicts with other laws, particularly certain provisions of Title 49 of the MCA. These conflicts can, of course, be resolved in the drafting process through the application of standard drafting techniques applied to all legislation involving conflicts with other laws.

Most of the constitutional issues surrounding employment preference law have not been litigated in Montana, and it cannot be said with certainty what the courts will hold regarding a Montana preference law. Decisions regarding the employment preference laws of other states are not binding. Court rulings on issues that have been or may be raised (constitutional and otherwise) in pending or future cases in Montana under the current law will in certain instances be applicable to any new law passed. Any new law passed by the upcoming special session is fairly likely to be challenged in court by one or more persons or groups on one or more grounds. It is the nature of such controversial laws which involve constitutional considerations and as to which there is little or no direct judicial precedent that the Legislature does its best to draft valid law based on sound policy and the courts construe the law as against constitutional provisions if called upon to do so.

When possible, this memo applies case law directly in point, Montana case law if any could be found. When no law directly in point was found, general legal principles and the law from similar areas was applied.

A concerted attempt was made to keep the discussion of each issue short and to the point, though certain issues required a more extensive discussion than others. Committee members desiring to delve more deeply into one or more issues may contact

John MacMaster at the Legislative Council's offices for citations to particular legal materials.

II. EQUAL PROTECTION

A. THE LAW

Unless the Legislature decides to repeal the employment preference provisions of Title 10, chapter 2, any preference legislation should be reviewed for validity under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under that clause's counterpart in the Montana Constitution, Art. II, Sec. 4.

1. Federal Equal Protection

The federal Equal Protection Clause guarantees that each individual be afforded equal protection under the law by the states. Of course, state legislation must often categorize or classify individuals or groups and may affect certain groups unevenly. Such classifications are not inherently invalid under the Equal Protection Clause. Broadly speaking, if a classification made by a state statute is found to be "reasonable" when analyzed under the tests established by the United States Supreme Court for that purpose, then the statute will be found valid for purposes of the Equal Protection Clause. The validity of a state statute under the Equal Protection Clause is determined by the application of one of three different tests.

If a state statutory classification does not involve identifiable minority groups traditionally the target of discrimination and disadvantage and does not infringe on the exercise of a "fundamental right" then it will be held valid if the classification made is rationally related to a legitimate state interest. Graham v. Richardson, 403 U.S. 365, (1971). This first test, the "rational basis" test, is the test most often applied to state statutes. Under this test the burden

to establish that there is no rational basis for the challenged statute's classification is on the individual who has made that claim.

The second test is said to "heighten" the standard of review used on statutes to which it is applicable because the statutes either burden a fundamental right or involve a classification of an identifiable minority group. That test is applied to any statute that explicitly classifies individuals on the basis of race, alienage, religion, or national origin (the "suspect classes") and to any statute that creates a classification that infringes on the exercise of a fundamental right. Under this test, overt classifications involving suspect classes create a presumption of purposeful discrimination and are reviewed under "strict scrutiny". San Antonio Independent School District v. Rodriguez, 411 U.S. 1, (1973). A statute that is found to discriminate against the "suspect classes" is rarely found valid. In order to uphold a statute that infringes on a fundamental right, or sets up a suspect class, the state must show that the statute is necessary to carry out a compelling state interest and that less restrictive alternatives carrying out the interest are not available. Dunn v. Blumstein, 405 U.S. 330, (1972).

The second or intermediate test is applied when the statute under analysis involves a classification of a group that is not considered a "suspect class" but that is a group that has been traditionally disadvantaged. This is the test that is applied to classifications based on sex. Reed v. Reed, 404 U.S. 71, (1971). Frontiero v. Richardson, 411 U.S. 677, (1973).

A statute that involves gender-based classifications is valid under this test if it can be shown that the classification bears a close and substantial relationship to important, valid governmental objectives. The burden is on the state to make this showing. Kirchberg v. Feenstra, 450 U.S. 455, (1980).

A subcategory of statutes to which either the second or third test may apply are those statutes that appear neutral but have a disproportionate adverse impact on either a suspect class or a traditionally disadvantaged class. To be held invalid, a statute of this type must first be shown to be discriminatory and to have been enacted for a discriminatory purpose. Washington v. Davis, 426 U.S. 229, (1976), Arlington Heights v. Metropolitan Housing Dev. Corp., 429, U.S. 252, (1977). If no such purpose is shown, the statute will be upheld.

2. State Equal Protection

Art. II, §4 of the Montana Constitution guarantees equal protection of the laws and prohibits discrimination on the basis of "race, color, sex, culture, social origin or condition, or political or religious ideas."

Generally speaking, in its interpretation of this section, the Montana Supreme Court has applied an analysis similar to that applied by the United States Supreme Court under the federal Equal Protection Clause. Montana Land Title Ass'n. v. First Am. Title, 167 M 471, 539 P 2d 711, (1975), Tipco Corp. v. City of Billings, 642 P 2d 1074, 39 St. Rep. 600 (1982). However, the Montana constitutional provision is broader in scope than the federal Equal Protection Clause has so far been found to be. The specific prohibitions against discrimination based on sex, social origin and political ideas may result in the application of a heightened test to statutes which involve classifications in this area. For example,

although the Montana Supreme Court has not yet so stated in cases in which a claim of sex discrimination has been raised, there is legal basis for the Court to rule that specific inclusion of sex in this provision means that classifications based on gender are "suspect" under Montana state law and thus subject to the strict scrutiny test. See Montana Constitutional Convention Official Transcripts, p. 1642.

Thus, generally speaking, a statute that clas- [illegible] ral Equal Protection Clause as well as under Art. II, § 4 of the Montana Constitution.

B. ANALYSIS OF EMPLOYMENT PREFERENCE OPTIONS

1. Options Generally

It is assumed here that Equal Protection law is relevant to at least three types of statutory classification that may be involved in employment preference legislation. These are: first, classifications created by a statute setting forth the group of employees who are entitled to a preference; second, classifications created by a statute setting forth the group of employers who must apply the preference; and third, classifications created by a statute setting forth the group of positions within an entity to which the preference is applicable.

2. Classification of Employees

A statute that extends an employment preference of any type to certain groups necessarily sets up two categories, the class or classes who are entitled to the preference and the class or classes who are not entitled to the preference, the latter thus being disadvantaged by its existence. For this discussion it is assumed that future legislation may extend some preference to veterans, spouses, and handicapped persons.

a. Federal Equal Protection

i. Veterans

As a matter of federal law the Supreme Court upheld the validity under the Equal Protection Clause of a state statute giving an absolute preference to veterans who as a group were almost all male, against a claim of sex discrimination in Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, (1983). Two aspects of that decision are noteworthy. First, the Court ruled that ... ough the facially neutral statute had had a disproportionate adverse effect on women, the classification created by the statute was neither gender-based nor motivated by a discriminatory intent. Second, the Court ruled that for the purpose of determining the existence of discriminatory intent the degree of preference (i.e., whether absolute or limited) extended is not relevant.

In decisions relevant to each of the classes mentioned under this heading, the United States Supreme Court has ruled that a right of governmental employment is not considered a fundamental right for purposes of the Equal Protection clause. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, (1975).

ii. Spouses of Veterans

It is unlikely that a classification made between spouses of veterans and non-spouses of veterans would disadvantage a suspect class or infringe upon a fundamental right, so such a classification would probably be tested under the rational basis test. Although that test is not difficult to

meet, a problem may exist in the breadth of the class of spouses of veterans (e.g., spouses of all veterans, only disabled veterans, only those veterans who cannot themselves use a preference, etc.). In evaluating whether or not there is a rational relationship between a statutory classification and its stated purpose, courts sometimes examine the scope of the class affected. It is settled that a class need not be drawn with mathematical exactitude. However, there have been cases that held that a class was so broad that the causal connection between the statutory classification and its purpose was too remote.

iii. Handicapped Persons

Here, too, the classifications made between handicapped and non-handicapped persons is not likely to trigger heightened review. Assuming that enhancement of employment of handicapped persons is a valid state interest and that the statute accomplishes that purpose, this classification could probably withstand the rational basis test.

b. State Equal Protection

i. Veterans

In this discussion it is assumed that for the purpose of application of state equal protection law, a veterans' employment preference does not infringe on a fundamental right and that the only class involved that may be "suspect" under state law is the class of females. It is further assumed that the issue of most concern here is whether a veterans' employment preference is

discrimination based on sex under state constitutional law.

The following are some considerations that may be helpful to a determination of this issue. In view of the variables of proof, and unsettled issues of the law, it is difficult to state with certainty whether a veterans' preference employment statute is valid against a state constitutional law claim of sex discrimination.

As was stated earlier, the Feeney case establishes that as a matter of federal law, a veterans' employment preference that is neutral on its face and has a disproportionate adverse impact on women but that was not enacted for a discriminatory purpose is valid under the federal Equal Protection Clause. Therefore the issue here is whether the Montana Constitution is sufficiently different from the United States Constitution to warrant a finding that an employment preference for veterans that is valid under the federal Constitution is a violation of state equal protection law.

In Crabtree v. Montana State Library, 40 St. Rep. 963 (1983), the Montana Supreme Court, in comparing the Massachusetts statute upheld in Feeney to the Montana employment preference statute, stated that "the Montana statute is even further from running afoul of equal protection considerations" 40 St. Rep. 963, 968. This may have settled the issue. It should be noted, however, as was stated in the concurring opinion in Crabtree, that the parties to the case did not raise the issue of sex discrimination in the district court or on appeal. The issue was raised in

amicus briefs. The portion of Crabtree that analyzes the sex discrimination issue is certainly highly significant to a discussion on Montana law in this area. However, in view of the particular circumstances of Crabtree's statements on sex discrimination, it is possible the issue will be raised and addressed again in the future.

It is assumed here that in a future case the Supreme Court may decide to reexamine the issue. If that assumption is incorrect then Crabtree will have settled the matter.

If the matter is reexamined there is legal basis (assuming proper proof) for the argument that a veterans' employment preference statute has a disproportionate adverse impact on the class of females, a potentially "suspect" class and that the state cannot show the law is justified by a compelling state interest. However, a ruling of this nature would be a departure from the United States Supreme Court's analysis of this issue in Feeney. Basic to the Feeney decision was the court's application of the Davis "intent" rule, i.e., that a facially gender-neutral statute that has a disproportionate adverse impact on females will be held valid unless it is shown that the state intended to discriminate in enacting the statute. (See Washington v. Davis discussion in A. 1.) The United States Supreme Court has also applied this rule to statutes that while facially neutral have a disproportionate adverse impact on a particular race. Race, of course, is a "suspect" class under the

federal Constitution. Therefore, under the Feeney approach, the fact that sex may be a "suspect class" under the Montana Constitution is not relevant to the issue of whether the statute is valid. The Montana Supreme Court has had occasion to apply the Davis intent rule and chose to do so in upholding a statute challenged on Equal Protection grounds. Fitzpatrick v. State of Montana, 38 St. Rep. 1448, 1455 (1981). If the Feeney rule is applied and no intent to discriminate is shown, then the issue of the reasonableness of a classification involving a "suspect" class is never reached. However, if a determination is made that the dimensions of the state constitutional provision that are different from the federal Equal Protection provision mandate that the Feeney requirement of intent need not apply, then it is more likely that a solid claim of sex discrimination could be advanced. In an analagous situation, in Martinez v. Yellowstone County Welfare Dept., 38 St. Rep. 474, (1981), the Montana Supreme Court ruled that when a claimant subject to facially neutral but factually discriminatory employment practices establishes a prima facie case of racial discrimination in employment under the Montana Human Rights law, illegal discrimination will be found unless the employer presents evidence establishing a legitimate nondiscriminatory reason for the action taken and that no proof of discriminatory intent will be required. It should be noted here that the court adopted the reasoning of cases decided under

Title VII of the federal Civil Rights Act in employment discrimination because this was a state employment discrimination case similar to those brought under Title VII. Title VII does not require proof of discriminatory intent if a prima facie case of discrimination has been established. Thus the rule used in Martinez may not be extended beyond that area of law.

A final consideration is the impact of Art. II, § 35. For discussion of this section, see item III of this memo, which follows.

ii. Spouses of Veterans

Although in some instances discrimination on the basis of marital status is prohibited under the Montana Human Rights law, marital status discrimination is not specifically prohibited by Art. II, § 4 of the Montana Constitution. Thus, the analysis of this issue under the state constitution would probably not be different from that made under the federal constitution.

iii. Handicapped Persons

The Montana Human Rights law also prohibits, in some instances, discrimination based on mental or physical handicap, but this group is not specifically protected by Art. II, § 4 of the Montana Constitution. Thus, here too, there is nothing in the state constitution that calls for an analysis different from that called for under the federal Equal Protection Clause.

3. Classification of Employers and Positions

It is possible that future legislation may create statutory classifications in the area of employers, or entities to which an employment preference is or is not applicable. For example, a decision could be made to exempt school districts from the coverage of the employment preference law. Further, a decision may be made to create statutory classifications within employers by setting up classes of employees to which an employment preference is or is not applicable. For example, a decision could be made to apply an employment preference statute to school districts but to exempt teachers from its coverage.

Thus far no cases have been found that indicate that classifications of this nature would be subject to a review other than that required under the rational basis test. Assuming that such classifications were in fact rationally related to a legitimate state interest, they would be valid under both federal and state equal protection law.

III. CONSTITUTIONAL PROVISION FAVORING VETERANS

Montana Constitution, Article II, section 35 provides that "the people declare that Montana servicemen, servicewomen, and veterans may be given special considerations determined by the legislature."

This provision has never been interpreted and its effect, particularly in relation to other provisions of the Montana Constitution, is an open question. The provision was proposed by Constitutional Convention delegate Mike McKeon. In the convention's minutes he is credited with the statement that "I think that we should include a section of this nature in the Bill of Rights to give the Legislature an impetus to try and help these individuals".

Standing alone, the provision does not appear to grant any benefits or to conflict with any provision of the state or federal constitution. It appears to encourage the legislature, in its discretion but acting within state and federal constitutional parameters, to enact legislation giving special considerations to veterans, and it is such legislation that would be subject to challenge under the state or federal constitution should it appears to violate a provision of one of them. However, in construing the Montana equal protection clause as against a veterans' preference law, section 35 might be interpreted as itself providing a rational basis for the creation of two special classes of people, servicemen and servicewomen, and veterans. The power granted the legislature to give these classes special considerations is one that the legislature already had. The current preference for veterans was enacted long before this provision became law, and though all states have a veterans' employment preference law, only a few have such a provision in their constitution.

IV. CONFLICT WITH FEDERAL LAWS GOVERNING EQUAL EMPLOYMENT OPPORTUNITY

Just because a proposed statute giving certain veterans and disabled civilians preference in public employment may not be held to violate the equal protection clause of the 14th Amendment obviously does not mean that there may not be other conflicts with federal laws, particularly those statutes, regulations, and executive orders adopted to ensure equal employment opportunity in state or local employment and those governing federal contract compliance. Where such a conflict exists, a job applicant disappointed under the state preference statute may use federal law to reverse the effect of the state preference statute and possibly invoke other remedies as well. The following analysis demonstrates whether any conflict between a Montana veterans'/disabled civilian's preference statute and federal law or regulations governing equal employment opportunity has been found or presumed.

ANALYSIS

A. MERIT SYSTEM COUNCIL

The Merit System Council is a state program established by statute (2-15-1006) and by rule (Title 2, chap. 23, ARM) under the authority of 2-18-105, MCA, as a "condition of participation in [federal] assistance programs" as prescribed by P.L. 91-648, the Intergovernmental Personnel Act of 1970 (42 USC §§4702, et seq.), and implementing regulations (5 CFR part 900). As a condition of receipt of federal funds, the Act requires states and political subdivisions to adhere to six Congressional findings that constitute "merit principles" governing the selection, advancement, and retention of employees. Several of these principles are:

"(1) recruiting, selecting, advancing employees on the basis of their relative ability, knowledge and skill;

* * *

(4) retaining employees on the basis of the adequacy of their performance;

(5) fair treatment without regard to race....or sex

* * *"

Although the Act also contains a statement (42 USC 4702) indicating an intent by the Congress to allow states to "run their own program", there are no cases at the federal or state level applying the merit principles in light of any veterans' preference laws or in light of the statement of intent. Some conflict with at least the spirit if not the intent of the Federal Act and the merit principles established by rule (5 CFR 900.601) is presumed. To the extent that a veteran's preference statute conflicts with the administrative rules of the Council (e.g., ARM 2.23.601 "Discrimination Prohibited"), the rules should be repealed or amended.

B. AFFIRMATIVE ACTION PROGRAMS

Federal requirements for affirmative action to correct the effects of past discrimination and prevent present and future discrimination by the adoption of programs calculated, usually,

to increase the number of women and minority group employees, may arise voluntarily, by contract, or by court order. They may also arise by state law (see below). Whatever the mechanism, the federal requirement for such a program and the federal guidelines of the Equal Employment Opportunity Commission (29 CFR part 1608) have as their primary authority Section 713 of Title VII of the Civil Rights Act of 1964 (42 USC 20000e-12). Because Title VII contains in section 712 (42 USC 20000e-11) its own exemption for federal, state and local veteran's preference laws, affirmative action programs based upon Title VII may contain provisions required by state law exempting veterans from their coverage.

Affirmative action programs may also, and in Montana do, arise by operation of state law. Executive Order 24-81 (October 13, 1981) required the Department of Administration to implement an equal employment opportunity program by administrative rule. To the extent that such rules and any implemented statute conflict with any veterans'/disabled civilians' preference law, they may and should be amended or repealed.

C. Title VI, CIVIL RIGHTS ACT OF 1964

Section 601 of the 1964 Civil Rights Act (42 USC 20000d) prohibits discrimination on the basis of race, color, or national origin "under any program or activity receiving Federal financial assistance". Since the decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) it is fairly clear that Title VI proscribes only that state conduct that would violate the equal protection clause of the 14th Amendment (see discussion of equal protection, Item II).

D. TITLE VII, CIVIL RIGHTS ACT OF 1964

Section 703 of the Civil Rights Act of 1964 (42 USC 200003-2), which prohibits a discriminatory effect even if there is no wrongful intent, is modified by an express exemption for veterans' preference laws (see discussion on affirmative action programs, supra). The exemption, however, applies only to Title VII and not to Title VI or other EEO statutes or programs.

E. CIVIL RIGHTS ACT OF 1866 (AS AMENDED)

The 1866 Civil Rights Act (42 USC 1981) requires all persons to be granted the same "equal benefits of all laws...as is enjoyed by white citizens". Like Title VI of the 1964 Civil Rights Act, this statute may be used to prevent racial discrimination by a state only where both a discriminatory effect and a discriminatory intent are found. It is presumed therefore that whether a discriminatory intent exists as to enactment of a veterans' preference statute will be governed by the same considerations as intent under the equal protection clause of the 14th Amendment (as applied in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (hereafter "Feeney", see discussion of equal protection, Item II).

F. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Section 4 of the Age Discrimination in Employment Act of 1967 (29 USC §623) prohibits discrimination against an applicant for employment because of an individual's age, and is, like those laws prohibiting sex discrimination, important because conditions of military service such as time of service may, like the opportunity to serve at all, determine whether one becomes a "veteran" under the law. This statute, like Title VI, requires proof of an unlawful intent and employment actions under a veterans' preference statute would therefore most likely be judged in accordance with Feeney.

G. VOCATIONAL REHABILITATION ACT OF 1973

Section 504 of the Vocational Rehabilitation Act of 1973 (29 USC §694) provides that no "otherwise qualified" handicapped person may be, solely by reason of his handicap, excluded from, be denied the benefits of or subjected to discrimination under any program receiving federal financial assistance. This statute, like Title VII, requires no showing of an intent to discriminate. Pushkin v. Regents of the University of Colorado, 658 F2 1372 (CA 10, 1981). As such, a provision for an employment preference for the handicapped is an advisable component of any

state veterans' preference statute, so as not to require continuous legal action by handicapped persons. A clear difference exists between the federal statute and the current Montana program, however, in that under federal law mentally handicapped persons are included within the definition of a "handicapped individual" (29 USC § 706(7)) but are excluded under the guidelines adopted by the Department of Social and Rehabilitation Services for administration of the certification program under 10-2-203(1). The federal definition is also somewhat broader in general.

H. REGULATIONS OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE

Under the authority of Executive Order 11246 (30 Fr 12319) the Secretary of the U.S. Department of Labor has adopted rules (41 CFR part 60) prohibiting discrimination based on race, color, religion, sex or national origin and requiring that all persons be given an equal employment opportunity with all federal contractors entering into contracts with the United States for more than $10,000.00. The rules apply to state and local contractors with the United States and apply to initial hiring, promotions, demotions, transfers, and layoffs. No exceptions have been provided for veterans and because no cases have been found balancing the requirements of state or national veterans' preference laws with the rules, it is prudent to assume that some conflict exists.

I. VIETNAM VETERANS' EMPLOYMENT RIGHTS

Section 507 of the Veterans' Rehabilitation and Education Amendments of 1980 and section 310 of the Veterans' Compensation, Education and Employment Amendments of 1982 (38 USC § 2012) require that any contract in an amount over $10,000.00 for procurement of personal property and nonpersonal services between any agency of the United States and any other party must contain a provision requiring the second party to take "affirmative action to employ and advance in employment" certain disabled veterans and veterans of the Vietnam era. Because these statutes

and implementing regulations (41 CFR part 60-250) apply to state and local governments and could require preference of Vietnam and certain other disabled veterans over the majority of veterans as a whole, and because the waiver contained in Title VII of the 1964 Civil Rights Act does not apply to affirmative action programs instituted under other authority, some conflict with the federal law is presumed.

J. PUBLIC WORKS EMPLOYMENT

The Public Works Employment Act of 1976 provides grants to state and local government for the construction and repair of public works. Section 107 of the Act (42 USC § 6706) requires the adoption of regulations to "assure special consideration" for the employment of disabled and Vietnam era veterans, and section 207 of the Act (42 USC § 6727) prohibits discrimination on account of race, color, national origin, or sex. Because the requirement for "special consideration" for Vietnam era and disabled veterans may require preference of those veterans at the expense of others, and because (of a lack of case law) it is unknown whether the nondiscrimination provisions require a showing of an intent to discriminate, some conflict with the federal law is presumed.

V. BARRING PREFERENCE TO THOSE WHO REFUSE TO SERVE IN MILITARY OR TAKE UP ARMS

Any veterans' preference law that would deny the preference to persons who refuse to serve on active military duty or refuse to take up arms, as does the current Montana law (section 10-2-205(1), MCA), might be subjected to attack on grounds of infringement of rights to free exercise of religion (First Amend., U.S. Const.; Art. II, sec. 5, Mont. Const.) and to freedom from discrimination based on religious or political beliefs (Fourteenth Amend., U.S. Const.; Art. II, sec. 4, Mont. Const.). In 50 USC App. Sec. 456(j), Congress has exempted from military service those persons who by reason of religious training and belief are opposed to participation in war in any form;

such persons are classified as 1-O, conscientious objectors, and must perform a two-year alternative service in civilian work contributing to maintenance of the national health, safety, or interest. The same law also provides for an exemption from combatant service for those who cannot conscientiously take up arms but whose beliefs do not preclude active noncombatant military service; such persons are classified 1-A-O, conscientious objectors.

In Johnson v. Robison, 415 U.S. 361 (1974), the U.S. Supreme Court upheld federal statutes that deny veterans' educational benefits to 1-O conscientious objectors who have performed alternative civilian service. Under these statutes, alternative service is not considered "active duty" and thus benefits are denied. 38 U.S.C. Sec. 1652(a)(1), 38 U.S.C. Sec. 101(21). The Court found that this discrimination is not a denial of equal protection because quantitative and qualitative differences between alternative civilian service and military service form a rational basis having a fair and substantial relation to the purposes of the statute, which are to compensate for disruption of civilian life, to aid in readjustment to civilian life, and to make military service more attractive. There would appear to be a similar "rational basis" for denial of a veterans' employment preference to 1-O conscientious objectors. The Court further held that the federal statute did not abridge the right to free exercise of religion because, while the first amendment prohibits governmental regulation of religious beliefs, as such, and interference with dissemination of religious ideas, it does not prohibit incidental burdens on the exercise of religion when justified by substantial governmental interests. It seems likely that denial of an employment preference would be held to be an "incidental burden" similar to the withholding of educational benefits. See also Darnell v. Township of Moorestown, 167 N.J. Super. 16, 400 A. 2d 492 (1979), following Johnson v. Robison, supra, and upholding a state law denying a $50 tax deduction to conscientious objector alternative service performers.

However, unlike 1-O conscientious objectors who perform alternative civilian service, 1-A-O conscientious objectors and servicemen who become conscientious objectors while in the military and receive 1-O discharges have actually served on active duty in the military. In Reynolds v. Dukakis, 441 F. Supp. 646 (D.C. Mass. 1977) the Court struck down a Massachusetts statute that denied veterans' benefits, including employment preference, to any person who received a 1-O conscientious objector discharge. The Court reasoned that the Massachusetts statute was in direct conflict with federal law and policy which provide a procedure for in-service conscientious objectors to obtain an honorable discharge and thereby to obtain federal veterans' benefits. The Court also noted that the Massachusetts statute appeared to have serious equal protection problems in that it would deny benefits to a person honorably discharged as a conscientious objector but would not deny benefits to one who was honorably discharged as unsuitable due to alcohol abuse, personality disorder, aberrant sexual tendencies, unsanitary habits, financial irresponsibility, apathy, or defective attitude. The Reynolds court expressly distinguished Johnson v. Robison, supra, on the basis of the plaintiff's active military duty as opposed to alternative civilian service. The Johnson court makes specific reference to the fact that 1-A-O conscientious objectors perform active military duty and are eligible for federal veterans' benefits, and none of that court's reasoning in upholding the denial of benefits to alternative service performers would seem to apply to the denial of any veteran's benefit to conscientious objectors who have served in active military duty.

In conclusion, although no cases directly on point were found, it appears that a veterans' preference law which applies only to those who have served in the armed forces or on active military duty, thereby excluding 1-O conscientious objectors who have performed alternative civilian service (see section 10-2-202(1), MCA), would be upheld. However, a veterans' preference law that would deny eligibility to a person who was a 1-A-O conscientious objector or a serviceman that received a 1-O

conscientious objector discharge, even though he fulfills that law's active duty requirement, would be highly suspect as being in conflict with federal law and a denial of equal protection; if that portion of section 10-2-205(1), MCA, which denies the preference "to any person who refused to serve on active duty in the military service to which attached" were applied to deny the preference to a person who received a 1-O conscientious objector discharge or that portion which denies preference "to any person who refused...to take up arms in the defense of the United States" were applied to deny a preference to a 1-A-O conscientious objector, such portions may be held invalid.

VI. RESIDENCE REQUIREMENTS

A requirement that a person must reside in the state for a certain period of time before a preference is claimed is looked upon with disfavor by the courts and was found by the courts of Minnesota and Massachusetts to violate the United States Constitution because it violated the right to travel interstate and denied equal protection of the law because there was no rational basis for the requirement. Carter v. Gallagher, 337 F. Supp. 626 (D. Minn. 1971); Stevens v. Campbell, 332 F. Supp. 102 (D. Mass. 1971). A requirement that a person claiming a veteran's preference must have resided in the state at the time he entered the armed forces has been upheld in the state of New York. Gianotasio v. Kaplan, 142 Misc. 611, 255 N.Y.S. 102 (1931); August v. Bronstein, 369 F. Supp. 190 (S.D. N.Y. 1974), aff'd. 417 U.S. 901 (1974).

A provision that one claiming a preference for a job with a local government, county, or local political subdivision of the state (such as a school district) must be a resident of that entity would not run afoul of the federal right to travel interstate. It would be open to challenge under the Montana Constitution's provision that no person may be denied equal protection of the laws, on the ground that the requirement is not rationally related to a valid state purpose sought to be served by the law.

In this regard the analogy to the Minnesota and Massachusetts cases finding a state residency durational requirement in violation of the federal equal protection clause is clear. This discussion does not relate to a requirement that the preferred person live in the area while working there after receiving the job in question; it relates only to a requirement that a person live in the area to be eligible to apply for a job covered by the preference law.

VII. SEPARATION OF POWERS AND SIMILAR ISSUES

A. GENERALLY

The following quote from 63 Am. Jur. 2d section 39 (Public Officers and Employees) is generally applicable to Montana. "The legislature is generally empowered, and sometimes by express authorization of the constitution, to prescribe the qualifications for holding public office, or particular offices, including municipal offices, provided it does not thereby exceed its constitutional powers or impose conditions of eligibility inconsistent with constitutional provisions...Where the constitution creates an office, but does not prescribe any specific qualifications for eligibility to it, the legislature has power to prescribe qualifications for such constitutional office...A regulation on the subject inserted in the constitution operates as an implied restriction on the power of the legislature to impose additional or different qualifications. This is especially true in regard to offices created by the constitution itself, unless that instrument, expressly or impliedly, gives the legislature such power...In several instances the fact that the constitution, while silent as to any specific qualifications for the particular constitutional office in question, did prescribe qualifications or disqualifications for eligibility to office generally, and some specific qualifications for certain other constitutional offices, has been interpreted as meaning that the omission of specific qualifications for the particular office was deliberate on the part of the drawers of the constitution, and done with

intention that as to such office, only the general eligibility requirements of the constitution were to be imposed, the result being that the legislature was powerless to prescribe additional qualifications for eligibility to such constitutional office...However, the legislature cannot enact arbitrary exclusions from office, and qualifications for office must have a rational basis, such as age, integrity, training, or perhaps, residence...The right of a legislature to prescribe qualifications is not inconsistent with the executive power of appointment to office."

The last sentence quoted above is crucial. What the legislature cannot do in Montana is prescribe qualifications for office if the constitution already prescribes qualifications for that office. If the constitution does not prescribe qualifications for an office, or empowers the legislature to prescribe qualifications for the office (even if in addition to those prescribed by the constitution) the legislature has the power to prescribe qualifications for an office, including offices of the judicial and executive branches and including offices the governor appoints persons to.

In State ex rel. Palagi v. Regan, 113 Mont. 343 (1942), a provision of the constitution that "any person qualified to vote at general elections and for state officers in this state, shall be eligible to any office therein except as otherwise provided in this constitution" was involved. The legislature had passed a law disqualifying certain persons from election or appointment to any office. The court stated that the question was whether a disqualification not included in the constitution could be added to the constitutional qualifications. The court said that it was well settled that statutes imposing qualifications or disqualifications additional to those stated in the constitution are void since they conflict with the constitutional prescription of the qualifications for office and that the constitutionally prescribed qualifications necessarily included a prohibition upon the legislative power. The court ruled that "it is apparent that prohibitions need not be expressly made in the Constitution, for

a declaration of a fundamental right may be the equivalent of a prohibition against legislation impairing the right."

B. GOVERNOR'S APPOINTMENTS

If the constitution provides qualifications for an office and provides that the office is filled by appointment of the governor, the case law indicates that the legislature does not have the power to set further qualifications or disqualifications for the office. If an office is filled by appointment of the governor and the constitution does not set qualifications for the office, the legislature has the power to set qualifications for the office. The primary issue here is not one of infringement upon the power to appoint. The primary issue is when the legislature may, and when it may not, set qualifications for an office. If it has power to set qualifications there is no infringement upon the power to appoint.

C. THE JUDICIARY

The law governing public officers generally (see A. GENERALLY above) applies to judges. As with governor's appointments, there is no separation of powers problem in setting, by legislation, qualifications or disqualifications for judges. The issue is again one of possible conflict with the constitution's delineation of qualifications or disqualifications. State ex rel. Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529 (1904) related to a provision of the constitution stating qualifications for district court judge. The court ruled that "it is elementary that the legislature cannot impose any additional conditions to those enumerated above [in the constitutional provision] as a prerequisite to any man's holding the office of district judge who might be elected or appointed to that office." Had the constitution set no qualifications the legislature could have done so.

D. THE LEGISLATURE

The legislature may bind itself and its staff to an employment preference law. A law made binding upon the lawmaker and its employees does not raise separation of powers problems

because one branch of the government is not infringing upon the constitutional powers of another branch.

E. THE UNIVERSITY SYSTEM

Article X, section 9, of the Montana Constitution, provides that "the government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system". This provision is the subject of an article in 35 Mont. L. Rev. 189 (1974). As pointed out in the article, states with similar constitutional provisions have, with the exception of one state, had the provision construed to grant the body governing the university system virtual autonomy from executive and legislative branch control and supervision and subject the governing body only to the express provisions of the state constitution applicable to the university system.

The key case on this subject appears to be Board of Regents v. Judge, 168 Mont. 433 (1975). The legislature had placed upon the appropriation of funds for the university system a condition that salary increases for the presidents of units of the system and for the commissioner of higher education could not exceed 5% in each year of the biennium. The court stated that "control over college president salaries is not a 'minor' matter. It does dictate university personnel policy...Such a limitation on significant expenditures indicates a complete disregard for the Regents' constitutional power...Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education. An important priority is the hiring and keeping of competent personnel. The limitation set forth in Section 12(6), H.B. 271, specifically denies the Regents the power to function effectively by setting its own personnel policies and determining its own priorities. The condition is therefore, unconstitutional." This case is good authority for the proposition that an employment preference law may not be applied to the university system.

F. LOCAL GOVERNMENTS AND LOCAL POLITICAL SUBDIVISIONS OF THE STATE

The provisions of the constitution relating to local governments and public schools contain language vesting in the legislature the power to legislate regarding them. The Montana Code Annotated contains numerous laws regulating them and the validity of such legislation is generally accepted by all.

VIII. CONFLICTS WITH COLLECTIVE BARGAINING AGREEMENTS

Present provisions relating to veteran's preference and collective bargaining do not involve constitutional issues. Public employee collective bargaining agreements, under the provisions of Title 39, Chapter 31, MCA, and other related law, are concerned with certain "bargainable" items. Managerial decisions are retained by the public employer. All hiring decisions are management decisions[1] (39-31-303, MCA). Both the Crabtree decision and Jensen v. State (Cause No. BDV-83-706, 8th Judicial District, Cascade Co., Dated 19 September 1983) are concerned with managerial decisions pertaining to "hiring", and thus are not covered by collective bargaining agreements.

Article II, section 31, Montana Constitution provides "No ... law impairing the obligation of contracts ... shall be passed by the legislature." In discussing contracts, "impairment" means "to weaken, to make worse, to lessen in power, diminish, to relax, or otherwise affect in an injurious manner." (Blacks Law Dictionary, 5th Ed. (1979). The Crabtree case applies to all present collective bargaining agreements as will any future Supreme Court decisions. Because the decision "interprets" the law in effect since 1921 and the decision isn't law "passed by

[1]The exception would be the use of hiring halls operated by craft unions. The collective bargaining agreement specifies that the union chooses the craftsmen to be employed in certain jobs. Inquiry has revealed no such contracts with public agencies in the state.

the legislature" no impairment of contract has been wrought by the Supreme Court. Thus if the absolute preference for "appointment and employment" (10-2-203(1), MCA) set forth in Crabtree preempts such non-managerial collective bargaining subjects as seniority for promotions, reductions-in-force, layoffs, and rehire after layoffs, any legislative relaxation of the strictures of absolute preference operates not as an impairment but as a benefit.

If however Crabtree doesn't reach such matters, and legislation does encompass them, there may be some impairment of contracts based upon individual analysis of the provision. In such an event the provision could be declared unconstitutional and former veteran's preference provisions would apply. A clause providing for exemption for current collective bargaining agreements could be written to be contingent upon a finding that present law isn't more restrictive than the new enactment.

IX. JUDICIAL APPOINTMENT OF PREFERRED PERSON IMPROPERLY DENIED A JOB

In Application of O'Sullivan, 117 Mont. 295, 158 P. 308 (1945) the Montana Supreme Court found the following provision of the veterans' and disabled civilians' employment preference law to be an unconstitutional delegation by the legislature to the judiciary of the executive branch (of the state or local government) power of appointment because the power delegated was in no manner connected with the operations of the judiciary:

> Any judge in said court shall have original jurisdiction to determine whether said applicant shall be preferred for appointment and to issue its order directing and ordering said appointing authority to employ said applicant,...

This provision was subsequently deleted from the law. The holding of this case still stands and appears to bar as a remedy for an improper failure to hire a preferred person a grant of authority to the courts to order the person's appointment to the

position. The case is the lead case in a veterans' preference in employment law article in 161 ALR 494.

X. RETROACTIVE LEGISLATION

A. GENERAL

The words "retrospective" and "retroactive" as applied to laws are synonymous and may be used interchangeably. A law is retrospective in a legal sense which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past. City of Harlem v. St. Highway Commission, 149 M 281, 284, 425 P2d 718 (1967).

The Legislature is free so far as civil matters are concerned to pass any retroactive laws which do not impair the obligations of contracts or interfere with any vested rights. Vested means accrued, completed, and consummated. There is no vested right in a mere expectancy. Vested rights may sometimes be reached by retrospective legislation that is enacted as a reasonable exercise of the police power. Police power is the inherent power of the state to prescribe reasonable regulations to preserve the public order, health, safety, and morals.

In interpreting retroactive laws, courts must consider the reasons advanced as justification for retroactive application of a statute to determine if it is constitutionally permissible. The Legislature can provide for retroactive application of a law when it has a reasonable basis for doing so. County of Los Angeles v. Superior Court, 402 P.2d 868, 871 (Cal. 1965).

B. PREFERENCE NOT A VESTED RIGHT

In the case of Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934), the Supreme Court held that war risk insurance policies were contracts creating vested rights. The court went on to say, "Pensions, compensation allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits

conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." Id. at 576-577.

Relying on Lynch, courts in New York in 1962 and Minnesota in 1972 held that statutes granting veterans' preference in public employment were not vested rights, but governmental gratuities which could be adjusted when and as the legislature saw fit.

C. PREFERENCE SUBJECT TO RETROACTIVE LEGISLATION

In his article, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harvard L. Rev. 692 (1960), Charles B. Hochman states, "there are two special types of statutory rights which may be altered or repudiated at any time until the benefits conferred by them are actually received. The first of these embraces rights arising from statutes granting gratuities from the government.", at 724.

Veterans' pensions has been held to be the bounties of government which Congress has the right to give, withhold, recall, or condition, at its discretion. Matter of Estate of Novotny, 446 F. Supp. 1027 (D.C.N.Y. 1978).

D. STATUTE OF LIMITATIONS

The legislature may provide a time period within which a legal action to enforce a right must be brought to enforce demands where there was previously no period of limitation or which shortens the existing time of limitation. 12 Am. Jur. 2d Constitutional Law § 445. The legislature may reduce a statute of limitations and the new period applies to accrued causes of action provided a reasonable time is allowed within which to assert the cause. Terry V. Anderson, 96 U.S. 628 (1877).

The Montana Supreme Court has consistently followed this rule. The current statute of limitations under the preference law is probably two years. Judge Loble has ruled that it is not 6 months. The legislature could shorten the statute of limitations leaving a reasonable time for actions to be brought which would otherwise be barred. See Whitcraft v. Semenza, 145 M 94, 399 P.2d 757 (1965) and cases cited therein.

E. CONCLUSION

The legislature may amend the preference statute retroactively, but if it chooses to do so it must be clearly stated in the legislation and its title. However, it is unclear whether the amendment may be applied to cases in which a judicial order requiring compliance with the existing law has already been issued, since in such a case it may be held that the right has already been consummated and is therefore vested.

The legislature may also shorten the statute of limitations for bringing claims under the preference statute provided it leaves a reasonable time to bring actions after the effective date of the act.

PREF2/ee/Memo

Senate Judiciary
(name)

12/13/03
(date)

NAME	REPRESENTING
Tom Gallagher	
Bob Durkee	VFW
Lisa Murphy	Personnel Div
Bud Liston	Personnel - Governor Committee for Handi
DENNIS M. TAYLOR	PERSONNEL DIV / DOA
Dave Depew	NCPEA
Sue Pomroy	Office of Comm. of Higher Educ.
Patty Ihle Jr.	A.P.
Thomas Fitzpatrick	
Chuck Wilson	C.F. Future
Chuck Frohman	NH School Bus Assoc
Anne MacIntyre	Human Rights Division
Jim Reynolds	SELF
Gary C Abbott	Senate

STANDING COMMITTEE REPORT

December 13 19 83
Bill Clerk

MR. President

We, your committee on Judiciary

having had under consideration Senate Bill No. 2

Respectfully report as follows: That Senate Bill No. 2

be amended as follows:

1. Title, line 7.
Following: "SPOUSES;"
Insert: "RECONCILING THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES;"

2. Title, line 8.
Following: "10-2-402,"
Strike: "49-3-103, and 49-3-201,"

3. Page 1, line 17.
Following: "are to"
Strike: "reward"
Insert: "recognize"

DO PASS

Chairman.

STATE PUB. CO.
Helena, Mont.

December 13, 19 83

4. Page 3, line 25 through line 6 on page 4.
Strike: subsections (iv), (v), (vi) and (vii) in their entirety.

5. Page 5, line 3.
Following: "advisor,"
Insert: "court reporter,"

6. Page 5, line 17 through line 19.
Strike: "college" on line 17 through "university," in line 19.

7. Page 5, line 23.
Following: "school district,"
Insert: "a community college, a postsecondary vocational-technical center or program, the Board of Regents of Higher Education, the Montana university system,"

8. Page 6, line 21.
Following: "include a"
Strike: line 21 through "service" on line 23.
Insert: "retired member of the United States armed forces who is eligible for or receiving a military retirement allowance based on length of service"

9. Page 9, line 5.
Following: "obtained a"
Insert: "permanent"

10. Page 9, line 15.
Strike: "and"
Insert: "or"

11. Page 12, line 15 through line 7 on page 14.
Strike: sections 12 and 13 in their entirety
Insert: "NEW SECTION. Section 12. The application of an employment preference as provided for in [sections 1 through 10] and 10-2-402 by a public employer as defined in [section 3] may not be construed to constitute a violation of this chapter."

NEW SECTION. Section 13. The application of an employment preference as provided for in [sections 1 through 10] and 10-2-402 by a public employer as defined in [section 3] may not be construed to constitute a violation of this chapter."

Chairman.

STATE PUB. CO.
Helena, Mont.

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12. Page 14, lines 8 through 10.
Following: "Repealer." on line 8.
Strike: the remainder of line 8 through "repealed" on line 10.
Insert: "Sections 10-2-201 through 10-2-206, MCA, are repealed. This repeal applies retroactively to bar any claim of violation or application of 10-2-201 through 10-2-206 that has not be reduced to judgment , whether or not the judgment is final, on [the effective date of this act]. Claims under 10-2-201 through 10-2-206 that have been reduced to judgment, whether or not the judgment is final, on [the effective date of this act] are enforceable. No claim for a violation of 10-2-201 through 10-2-206 may be made under [section 8] of this act."

13. Page 14, line 20.
Strike: "subsection (3)(b)"
Insert: "section 14"

14. Page 14, line 23 through line 9 on page 15.
Strike: subsection (3) in its entirety.

15. Page 15, line 10.
Insert: "Section 17. Codification instruction. (1) Section 12 is intended to be codified as an integral part of Title 49, chapter 2, and the provisions of Title 49, chapter 2 apply to section 12.
(2) Section 13 is intended to be codified as an integral part of Title 49, chapter 3, and the provisions of Title 49, chapter 3 apply to section 13."

AND AS AMENDED, DO PASS.

Chairman.

STATE PUB. CO.
Helena, Mont.

STATEMENT OF INTENT

SENATE BILL 2

A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a public employer.

A statement of intent is also required for this bill because section 9 requires the department of administration to adopt rules implementing sections 1 through 10 and to consult with the department of social and rehabilitation services in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to sections 1 through 10.

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the

following matters and take into account the following considerations.

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a veteran, disabled veteran, handicapped person, or eligible spouse, and the requisite residency and citizenship requirements. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants and that once an applicant has substantially complied with the rules, a public employer should make every reasonable attempt to verify the existence of the preference.

(2) Handicapped persons -- certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical impairment that substantially limits one or more major life activities, and outline in what instances a physical impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a combination of a statement of general

principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Separations and discharges. The legislature intends the rules to apply federal law and further define separations under honorable conditions and the various types of discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the

selection process for a job should a court order the selection process reopened, and include a method of giving notice to those who applied for the job informing them of the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10.

SENATE BILL NO. 2

INTRODUCED BY MAZUREK, H. HAMMOND, TVEIT, HAFFEY

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; RECONCILING THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES; AMENDING ~~SECTIONS~~ SECTION 10-2-402, ~~49-3-103, AND 49-3-201~~, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; PROVIDING FOR PARTIAL RETROACTIVE EFFECT OF THE REPEAL; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

NEW SECTION. Section 2. Purposes. The purposes of [sections 1 through 10] are to ~~reward~~ RECOGNIZE veterans for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans and handicapped persons.

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual who:

(a) served on active duty;

(b) has been separated from service under honorable conditions; and

(c) suffers a service-connected disability determined by the United States veterans administration to be 30% or more disabling.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United

States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state

law library, or similar office in a state district court for a position within the judicial branch;

~~(iv) a unit, as defined in 20-25-201, for a position within the Montana university system;~~

~~(v) the office of commissioner of higher education for a position within that office;~~

~~(vi) a college for a position within that college;~~

~~(vii) a center or program for a position within the postsecondary vocational-technical education system;~~

~~(viii)~~ (iv) a city or town for a municipal position, including a city or municipal court position; and

~~(ix)~~ (v) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)~~(ix)~~(v) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)~~(ix)~~(v) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, COURT REPORTER, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, ~~college---including----a----community----college, postsecondary---vocational-technical---center---or--program, university,~~ or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, A COMMUNITY COLLEGE, A POSTSECONDARY VOCATIONAL-TECHNICAL CENTER OR PROGRAM, THE BOARD OF REGENTS OF HIGHER EDUCATION, THE MONTANA UNIVERSITY SYSTEM, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

(9) "Under honorable conditions" means a discharge or separation from active duty characterized as under honorable conditions. The term includes honorable discharges and general discharges but does not include dishonorable discharges or other administrative discharges characterized as other than honorable.

(10) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense; and

(ii) has been separated from service under honorable

conditions.

(b) The term does not include a ~~person--receiving retirement--pay--from--the--United-States-based-on-length-of military-service~~ RETIRED MEMBER OF THE UNITED STATES ARMED FORCES WHO IS ELIGIBLE FOR OR RECEIVING A MILITARY RETIREMENT ALLOWANCE BASED ON LENGTH OF SERVICE AND DOES NOT INCLUDE ANY OTHER RETIRED MEMBER OF A PUBLIC RETIREMENT SYSTEM, EXCEPT SOCIAL SECURITY, THAT IS SUPPORTED IN WHOLE OR IN PART BY TAX REVENUES.

(11) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section

8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

NEW SECTION. Section 5. Eligibility requirements. No veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

(1) he is a United States citizen;

(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;

(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and

(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

NEW SECTION. Section 6. Certification of handicapped

persons. The department of social and rehabilitation services shall certify persons as handicapped for the purpose of employment preference as provided in [sections 1 through 10].

NEW SECTION. Section 7. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for ~~life. However, once he has obtained a~~ PERMANENT ~~position because of the application of the employment preference, he may not use the preference again~~ NO LONGER THAN 10 YEARS FOLLOWING SEPARATION FROM SERVICE OR FOR NO LONGER THAN 10 YEARS FOLLOWING [THE EFFECTIVE DATE OF THIS ACT], WHICHEVER IS LATER.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment

preference for as long as the person is missing in action or a prisoner of war.

NEW SECTION. Section 8. Enforcement of preference. (1) A public employer shall, by posting ~~and~~ OR on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim is a complete defense to an action under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which his application was

received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. The public employer has the burden of making a clear showing that the applicant was not substantially equally qualified with the person hired.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i), the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a

petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the

preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10].*

Section 12. Section 49-3-103, MCA, is amended to read:

"49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap;

(a) when based on the preference provided in [sections 1 through 10];

(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or

(c) where the differentiation is based on reasonable factors other than age;

(2) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) from discharging or otherwise disciplining an individual for good cause."

Section 13. Section 49-3-201, MCA, is amended to read:

"49-3-201. Employment of state and local government

personnel. (1) State Except as provided in [sections 1 through 10], state and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall insure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to insure utilization of minority group persons."

NEW SECTION. SECTION 12. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS

CHAPTER.

NEW SECTION. SECTION 13. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS CHAPTER.

NEW SECTION. SECTION 14. SUBMISSION OF DATA. EACH PUBLIC EMPLOYER SHALL SUBMIT TO EACH REGULAR SESSION OF THE LEGISLATURE A REPORT CONTAINING DATA REGARDING VETERANS' EMPLOYMENT UNDER THE PROVISIONS OF THIS ACT.

NEW SECTION. Section 15. Repealer. ~~Subject to section 16(3)(a) of this act, sections 10-2-201 through 10-2-206, MCA, are repealed.~~ SECTIONS 10-2-201 THROUGH 10-2-206, MCA, ARE REPEALED. THIS REPEAL APPLIES RETROACTIVELY TO BAR ANY CLAIM OF VIOLATION OR APPLICATION OF 10-2-201 THROUGH 10-2-206 THAT HAS NOT BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS ACT]. CLAIMS UNDER 10-2-201 THROUGH 10-2-206 THAT HAVE BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS ACT] ARE ENFORCEABLE. NO CLAIM FOR A VIOLATION OF 10-2-201 THROUGH 10-2-206 MAY BE MADE UNDER [SECTION 8] OF THIS ACT.

NEW SECTION. Section 16. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is

invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 17. Effective date -- applicability ~~--saving clause~~. (1) This act is effective on passage and approval.

(2) Except as provided in ~~subsection (3)(b)~~ SECTION 14 15, this act applies only to positions that are filled after the effective date of this act.

~~(3)(a) Subject to the applicable statute of limitations and to subsection (3)(c), a claim for violation of 10-2-201 through 10-2-206, whether or not it is pending in court on the effective date of this act, may be pursued under and must be governed by 10-2-201 through 10-2-206.~~

~~(b) However, the only relief that may be granted on a claim described in subsection (3)(a) is that provided in section 8(4)(c)(iii) of this act, and the court may grant no other relief, including that provided in 10-2-206 or any judicial construction of 10-2-206.~~

~~(c) A claim under 10-2-201 through 10-2-206 must be filed within 60 days after the effective date of this act.~~

NEW SECTION. SECTION 18. CODIFICATION INSTRUCTION. (1) SECTION 12 IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 49, CHAPTER 2, AND THE PROVISIONS OF TITLE 49, CHAPTER 2, APPLY TO SECTION 12.

(2) SECTION 13 IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 49, CHAPTER 3, AND THE PROVISIONS OF TITLE 49, CHAPTER 3, APPLY TO SECTION 13.

-End-

MINUTES OF THE MEETING OF THE HOUSE JUDICIARY COMMITTEE
DECEMBER 15, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown in Room 224K at 9:30 a.m. Roll call was taken and all committee members were present. Also present were Brenda Desmond, Staff Attorney, Lois Menzies, Legislative Researcher, John McMaster, Staff Attorney, and Alice Omang, Secretary.

SENATE BILL 2

SENATOR MAZUREK, District 16, explained the differences that exist between the Senate and House versions of the interim committee bill. He informed the committee that the House version of the bill applies only where there are honorable discharges as opposed to discharge under honorable conditions. The House version contains mental impairment and the Senate version does not. In the House version, the universities and community colleges are in and in the Senate version, all educational facilities are out with the exception of those which are operated by the state of Montana, such as the School for the Deaf and Blind, Mountain View, etc. In the House version, the provision against "double-dipping" is the same as the Senate, as is the 10 and 10 limitation. The Senate version still contains the citizenship and residency requirement; the House version requires residency at the time of entry into the service. The House version defines "disabled veteran" as any disabled veteran as opposed to 30% disability. The House adopted the scored testing procedures, using the 5% differential.

SENATOR MAZUREK indicated that the Senate made a couple of minor changes in the bill. One change is that notice to employees by the public employer and notice to the applicant can be done either by posting or by putting it on the application form. The Senate also adopted a report to the legislature by public employers, showing how many people they have hired under veterans' preference. He continued that they made one amendment to the title, which made specific reference to the retroactive repeal because they felt they better be clear that that is what they are doing in the title.

BRENDA SCHYE, representing the Women's Lobbyist Fund, stated they have supported employment preference for veterans and the handicapped. She contended they would support a preference of ten years, providing the grandfather clause be limited to only two years. She told the committee that if the legislators can restore a balance to this bill, they will apply all their efforts towards its passage but as it now stands, they cannot support it. (See EXHIBIT 1.)

BOB LISTON, representing the Governor's Committee on Employment for the Handicapped, said this bill addresses the fact that there has been discrimination and there is still discrimination against disabled persons. He cited some statistics that showed, historically, the disabled have been under utilized and discriminated against. He felt disabled persons, whether veteran or civilian, should have an equal preference in the law and the mentally impaired should be considered in the bills as the mentally ill are just as disabled as anyone in a wheelchair in all respects. He also asserted that he felt school systems of all kinds should be included in the preference as the purpose of this bill is addressing discrimination and the only way to address discrimination is through education and the only way to educate is to teach. He commented that he thought it would be hard pressed to find a handful of disabled teachers in the state of Montana.

CHIP ERDMANN, representing the Montana School Boards Association, indicated both the House and the Senate versions of the bill exclude school districts and vo-tech centers and they certainly support that and continue to support it. He also noted that in school districts, where they do contract with their employees, they could also have a breach of contract action and would have additional problems.

REPRESENTATIVE SWIFT, District 91, stated if they are going to have a preference bill, he felt they should include the bulk of the jobs the public sector provides and that is education. He requested that on page 4, lines 3 through 9, this language be reinserted, and on page 5, lines 20 through line 22 and on page 2, lines 2 through line 6, this language be reinserted. He felt by doing this, they would have an approach that would have a fair and equitable practice that would open up public jobs for veterans.

DENNIS TAYLOR, Administrator of the State Personnel Division, Department of Administration, stated he was in support of SB 2. It clearly defines the nature of the preference and establishes the type of preference that, at [illegible] government, has [illegible] beneficiary of that preference. He also felt SB 2 does not impose any [illegible] administrative cost.

REPRESENTATIVE PISTORIA, District 39, said all of the conditions which he stated on the floor of the House yesterday should be in the bill and he thought they would be wise to put back in what the House did on education at least, and should also consider including all of the public education system.

REPRESENTATIVE SANDS, District 68, spoke about the amendments he offered and were adopted in the House during consideration of HB 8, yesterday. He offered the amendments to require an objective scoring system for applying

veterans' preference in state government. He felt that is really the only way to have any kind of an effective veterans' preference. He thought that without that kind of approach, they do not really have a veterans' preference and they should simple adopt Senator Stephens' kind of an amendment. It is merely a cosmetic approach to Senator Stephens' bill.

He said the committee should look at the definition of "substantially equally qualified" which says, "substantially equally qualified means that the qualification of two or more persons among whom the public employer cannot make a reasonable determination if the qualifications held by one person are significantly better suited for the position that the qualifications held by the other." He emphasized it is clear that it is in the determination of the public employer whether that person is substatntially qualified. He said that under any circumstances, he would have reservations about a standard written as broadly as that. When you look at the history of what Montana has done with veterans' preference, being on the books since 1921, he thought that one needs to be even more skeptical of the approach outlined in the bill for state employees. He indicated they had testimony from a number of people on the floor yesterday that contended, in effect, what state government did prior to the Crabtree decision was to ignore veterans' preference. They may have used it on an occasional basis but they really didn't pay any attention to it. Representative Sands explained what happened to Vivian Crabtree before she went to the supreme court.

SPEAKER DAN KEMMIS, District 94, stated he appreciated the work the committee has done so far and he realizes they are not in a very good position, but, after the debate yesterday, the committee is in a better position to see what the position of the House is. He asked the committee to strike a reasonable balance between being responsive to the position that the House as a whole has taken on issues, and, at the same time, being responsive to the issues that are being raised here this morning. He commented he thought the process had brought them particularly to the area of lifetime preference--one time only versus the 10 and 10 or 10 and 2. He felt the House had broke the log jam of a lifetime preference yesterday and the question now is, can they restore the balance that Senator Mazurek's committee was always searching for. This would be a major task of this committee this morning.

JIM NYS, EEO Coordinator of the Employee Relations Bureau of the Department of Administration, testifying at the request of Chairman Brown, said the Uniform Selection Guidelines are essentially regulations of the federal government that cover the concept of written testing, interview structuring and that sort of thing. (See EXHIBIT 2) Any testing the state currently does, or might do in the future, is subject to these guidelines and procedures which were adopted in the late 1970s by federal law. He

explained they basically require any employer that is going to use that kind of device to validate and insure reliability of the device. He informed the committee these guidelines specifically address one thing that is under consideration by the legislature and that is the relationship of local and state law to the guidelines, which say, "The Guidelines permit ranking where the evidence of validity is sufficient to support that method of use. State or local laws which compel rank ordering generally do so on the assumption that the selection procedure is valid. Thus, if there is adverse impact and the validity evidence does not adequately support that method of use, proper interpretation of such a state law would require validation prior to ranking." His concern was whether the Brand 5% amendments would allow sufficient flexibility to meet federal standards.

There were no further witnesses and Senator Mazurek closed.

REPRESENTATIVE SCHYE questioned how many employees in state government right now are veterans. Mr. Nys responded that 27.4% would be veterans in their own right, which would include peacetime veterans.

REPRESENTATIVE SCHYE asked if there were any statistics that were available for veterans in local government. Mr. Nys informed him that he does not have any readily available information.

CHAIRMAN BROWN indicated they have a sheet that gives estimates of the persons who are eligible for preference and they would get it xeroxed and passed out. (See EXHIBIT 3)

REPRESENTATIVE HANNAH asked how many people used their preference when they were hired or did they just happen to be veterans. Mr. Nys responded that all they asked was, "Are you one of the following?" and that percentage was the number of full-time employees who answered affirmatively.

CHAIRMAN BROWN queried what kind of problems does Representative Brand's 5% amendments cause in regards to the Civil Rights Act. If it does cause problems, is there a way we can adjust it to accommodate the requirements of the federal law. Mr. Nys replied he did not think there was a problem as long as the requirements of the guidelines are met. Any time a test is used to determine the ranking of individuals, and there has been sufficient background work that says, if you say one person is high scoring and somebody else is low scoring, that is not simply just an arbitrary assignment of points--there must be some relationship between the score and their ability to perform on the job.

CHAIRMAN BROWN asked if he was alluding at all to the fact that it would place an undue burden on state government to try and meet those requirements. Mr. Nys answered that the guidelines strongly encourage, and

the courts have interpreted that to mean almost require, that guidelines be professionally developed. There is no one that currently works for state government that has the criteria required to develop the guidelines.

CHAIRMAN BROWN asked if Dennis Taylor perceived this as a problem. Mr. Taylor responded if they have that kind of a requirement from the bill that emerges from the legislature, we will have to acquire the resources to do the kind of validation and to assist the agencies to develop the proper procedures.

CHAIRMAN BROWN asked if that would mean an additional appropriation now. Mr. Taylor responded that if you are going to require that type of standard, it is absolutely imperative resources be available at this date or else delay the effective date until they can reach that point. He pointed out to the committee that prior to the decentralization of the Merit System Bureau, they did have the capacity within state government to assist agencies in validating their procedures. However, when those 11.5 FTEs were eliminated with the cutback in federal funds, they lost that capacity. He continued they do not have that capacity now but do have one selection specialist who works on a daily basis with agencies to try and bring their selection practices to the highest degree. They have been discouraging the use of unvalidated procedures. He explained they have two examinations, that he is aware of, that have been professionally developed and professionally maintained. They encourage those as a cost-effective way to select people.

MR. TAYLOR further explained it is technically feasible to do the things recommended by Representative Brand and Representative Sands but they need resources to carry that out. Depending on the amendments that they adopt, he can comment on what they believe they would have to have as a bare minimum to have to start with this next week to implement that concept in state government but he could not speak for local government.

REPRESENTATIVE CURTISS asked if they don't have anyone to do that. How do they handle the implementation of the federal programs. Mr. Taylor responded that over the years they had merit system agencies. They spent approximately $200,000 a year and were able to develop validated scoring procedures. Those are the scoring procedures that exist in state government now. He told the committee they have some doubts about their ability to maintain those scoring procedures that were developed when they had sufficient resources.

REPRESENTATIVE FARRIS referred to Representative Sands' comment that state government has ignored the veterans' preference and she wondered how he would explain the statistically documented over-representation of veterans in the state labor population if the veterans' preference had been ignored in the past. Representative Sands answered he did not know how to explain

it and the only thing he can think of is that veterans have an interest in working in state government perhaps, because of their experience in working in federal government, which is what the military is.

REPRESENTATIVE FARRIS asserted Representative Sands had also expressed disbelief in the fiscal note which was attached as the cost of implementing his amendment on the floor yesterday and she asked if he had any other dollar amount he would feel was reasonable or did he have another alternate fiscal note he might offer. Representative Sands responded he did not but he is quite skeptical of a fiscal note that was developed in a manner of minutes and how it was done.

REPRESENTATIVE FARRIS asked him if he had any expertise in this field or any reason to believe the dollar amount is incorrect other than his own skepticism. Representative Sands answered he had already said he has no expertise in this at all.

REPRESENTATIVE FARRIS asked Senator Mazurek if he had asked for a fiscal note on the entire bill and the cost of implementing veterans' preference to the state of Montana. Senator Mazurek replied he had not, but the feeling was the Senate bill would allow whatever procedures are in use right now and decisions would be made on whatever hiring criteria the public employer would develop without the necessity of having to impose a new system that state government would have to develop. He thought the reason there was never a fiscal note was because the testimony in the interim committee was that none would be necessary because it was simply a matter of using whatever job description and selection criteria was in place and being able to demonstrate to a reviewing body that you could determine which of two or more applicants were better qualified.

REPRESENTATIVE FARRIS commented she felt the balance of needs of Montana citizens has been raised and there was some testimony in the subcommittee that hasn't been offered at this meeting which was that there have been programs that have been designed to reintegrate people who have been discriminated against in the past into government jobs and these undertakings have, by and large, failed because of veterans' preference in part. She indicated she would like to see a fiscal note showing how much the state of Montana is paying to keep some people on welfare so that they can give some people, who statistically have never been discriminated against, a preference in hiring. She thought maybe it is time they produce a fiscal note based on the balance in state government.

REPRESENTATIVE EUDAILY noted in section 14, of SB 2, it says they shall report data regarding the veterans' employment to the legislature and he wondered how they were going to do this. Did each individual city have to report to the legislature or would this be collective through some

department? Senator Mazurek replied that was a floor amendment offered by Senator Van Valkenburg and it does apply statewide to cities, counties, and state government. He assumed the Department of Administration would have to adopt rules to implement that, but he wouldn't care a bit if they took it out as he felt the information is probably available elsewhere.

REPRESENTATIVE HANNAH commented they know how many veterans there may be in employment, but they don't know how many are in employment because of the use of the preference. Senator Mazurek indicated that was a policy decision and perhaps if that is the intent of the legislature, then they should clear it up to make sure they are accomplishing what they want to accomplish.

REPRESENTATIVE CURTISS said she had a copy of the policies of various departments of state government and she wondered if the federal government subsidizes the cost of these or were they compiled by the personnel department. Mr. Taylor responded those were complied by the State Personnel Division in cooperation with the Equal Employment officers in each of the agencies.

REPRESENTATIVE CURTISS inquired about the overall cost of that appropriation. Mr. Taylor answered the Personnel Division's appropriation is approximately $1.2 million and explained what this consisted of.

CHAIRMAN BROWN noted Senator Towe had some amendments he wished to propose but was not in attendance at the meeting at this time.

SENATOR MAZUREK explained Senator Towe's concern. In both the House and the Senate, the Judiciary Committees have adopted an amendment which bars pending claims that have not been reduced to judgement. He is concerned they may have some difficulty with that provision so he has an alternative provision which would be in addition to this provision.

CHAIRMAN BROWN explained his intention will be to offer the first half of that amendment, which clearly defines the intent of the legislature in the latter section, but to not offer the last half of that amendment, which provides the alternative, unless someone else in the committee wishes to offer it. He explained the reason for this is he felt they were giving the court the clear excuse to throw it out and take the second alternative and he doesn't like that manner of proceeding. He wondered if there were any problems with doing it that way.

SENATOR MAZUREK said he has done some research in this area and gave what he had to Ms. Desmond, Mr. Petesch and Mr. McMaster, of the Council staff, and they have done some additional research. He indicated he would be comfortable with whatever conclusion they reach. He informed the committee he was advised yesterday, by the legal staff, that they felt the amendment as presently set forth in the bill is sufficient and will pass court tests.

REPRESENTATIVE HANNAH asked if these amendments came up before the Senate Judiciary Committee or were they on the floor of the Senate. Senator Mazurek reponded the amendments had not been discussed in either place. Senator Towe brought his concern to him yesterday. He told him about his research and asked him to go over that with the Council staff. He was doing that yesterday afternoon, so they were prepared after that. He stated the Senate has not seen these amendments.

There were no further questions and the hearing on SB 2 was closed.

EXECUTIVE SESSION

Senate Bill 2

REPRESENTATIVE KEYSER moved the amendment that the House voted yesterday on the House floor be incorporated into the Senate bill and the Senate bill be changed so the bill will be exactly the same as when they finished the session yesterday. He advised that if these were different bills, he would not take this action, but they do have differences of opinion and it will undoubtedly have to go to a conference committee. Representative Daily seconded the motion.

CHAIRMAN BROWN proposed a substitute motion covering the following amendments which would be included in the Senate bill:

1. Representative Ramirez's amendment changing the preponderance of evidence, which would clear up that language, recognizing that if Representative Sands' amendment is later put back into the bill, they will need to go back and address some difficulties between Representative Ramirez's amendment and Representative Sands'.

2. Representative Hemstad's amendment regarding Montana's preference.

3. Representative Kitselman's amendment, which basically allows for the National Guard to do a little "double-dipping."

4. Representative Pavlovich's amendment, eliminating the 30% criteria.

5. Putting back in the honorable discharge and eliminating the general discharge category.

6. Putting back in the "mental or."

7. Putting back in "including the university system" as they had in the bill, but excluding "public school systems and the vo-techs."

8. To remove the residency requirements as Representative Ramirez proposed in the committee hearing on HB 8.

9. Remove the compliance report provisions that are in the Senate bill, which were defeated on the House floor.

REPRESENTATIVE JENSEN seconded the motion.

REPRESENTATIVE RAMIREZ said he realized what they were trying to do, but he didn't agree with it and felt this would put more burden and pressure on the conference committee. He indicated he felt very strongly about some of these and a vote of 57-41 on the university system was not so overwhelming that there could not be a turn around. He thought there were some in this list that are more than just routine amendments.

CHAIRMAN BROWN explained his point in doing this is to assess where the committee is.

REPRESENTATIVE CURTISS said she supported what he was trying to do. As a practical matter, they all know this is going to be hammered out in a conference committee and she thought he might just ask the members of the committee if anyone has essentially changed their position since yesterday.

REPRESENTATIVE ADDY commented he could support the motion even though he had some problems with some of these amendments. He just doesn't think the votes are there to turn it around in committee.

REPRESENTATIVE RAMIREZ explained there were two burden of proof amendments that he had. One was in committee and one was on the floor of the House and he assumed they were including both of these in this motion. Chairman Brown responded that he was.

A vote was taken on the substitute motion and it carried with Representative Ramirez and Representative Keyser voting no.

CHAIRMAN BROWN commented that Representative Brand's amendments are really a policy decision. They can do that, but it may cost some money and he wondered if this was correct. Mr. Taylor replied it was.

REPRESENTATIVE ADDY addressed the grandfather provision and the duration of the preference. He moved to amend the bill to show the duration of preference would be 10 years after the person is separated from the service or for 4 years after the effective date of the act, whichever one is longer.

Representative Darko seconded the motion.

REPRESENTATIVE RAMIREZ moved, as a substitute motion, that this be changed to 10 and 5. Representative Addy seconded the motion.

REPRESENTATIVE HANNAH said this is the only area where the House and Senate have agreed and it was a big agreement that it be 10 and 10.

REPRESENTATIVE BERGENE exclaimed she did not think it was silly to address something they do not feel was really addressed yesterday and she thought the witness from the Womens' Lobbyist Fund was really able to tell them what that means and why it is so important. She continued that some of her constituents who are veterans have expressed concern about the pool of young persons who are coming out of the university systems and they feel these young people should have more of an opportunity. Public employment is very important to them and competition is very fierce. She indicated she is also concerned about women, particularaly those who are single heads-of-households, but also women who are preparing themselves for managerial positions as well and she contended that veterans are conscious of this.

CHAIRMAN BROWN commented he thought the floor would probably put it back to 10 and 10. He didn't think this committee would live with that and he hoped they would keep their comments brief.

REPRESENTATIVE KEYSER explained he gets a little upset that they are being told they didn't get all the facts and they didn't know what they were doing when it was explained on the floor. They have heard from the women's groups at different committee hearings. They heard a good explanation on the floor of the 10 and 10 and he would make a substitute motion that this amendment DO NOT PASS.

REPRESENTATIVE RAMIREZ explained he voted for the 10 and 10 yesterday on the floor because it was the first amendment made that dealt with the question of comparing a permanent or lifetime preference to one that was for a limited period of time and his first interest was in getting rid of that lifetime situation because he felt it would be so administratively costly and it would be a difficult thing to keep track of. He said he understands this is the place where there seems to be agreement, but he does not think it is fair to say we should bind ourselves into that because the aspect of how it came about has an important bearing on the figures that were adopted yesterday.

CHAIRMAN BROWN said the Keyser motion is not in order as a DO NOT PASS is only in order on a bill on second reading. The way to defeat amendments is to vote against the amendments. He clarified by saying they were voting on the Ramirez substitute motion for 10 and 5 and a vote of "yes" is for 10 and

5. The motion was voted on and carried with 11 voting yes and 7 voting no. (See Roll Call Vote.)

REPRESENTATIVE HANNAH moved the Brand amendments be included in the bill. Representative Daily seconded the motion. The motion was voted on and failed with 8 voting yes and 10 voting no.

REPRESENTATIVE HANNAH moved the Sands amendments be adopted. Representative Daily seconded the motion.

REPRESENTATIVE DAILY said he felt this would be the bill that would be discussed in conference committee and he thought it was imperative they put this amendment in so at least it will be discussed in the conference committee.

REPRESENTATIVE CURTISS asserted that if they really want to hire the most qualified people, this is the vehicle by which they could accomplish that.

REPRESENTATIVE RAMIREZ told the committee he was really reluctant to speak against this amendment because he thought Representative Sands had addressed a problem in a legitimate way. He feels the amendment goes too far and it goes way too far as far as what they have been able to consider. He felt they are really imposing a burden on state government that is enormous. He commented he had looked at these guidelines that have to be complied with, although he disagrees with Mr. Taylor in one sense as he says it is technically possible to write up tests that will really measure objectively these things and he is not really convinced in his own mind that that is really true. He felt they were taking an exercise of judgement away from the hiring process and the guidelines are extremely difficult to meet. He thought there were many jobs that cannot be measured by tests, or it would be extremely difficult to develop tests for that purpose. He suggested they bring these proposals up in 1985

A vote was taken on the motion and the motion failed with 7 voting for the amendment and 11 voting against it. (See Roll Call Vote.)

LOIS MENZIES, Legislative Researcher, explained some technical amendments she felt needed to be included in the bill. She suggested the following amendments:

1. On page 2, line 21, following the "a", insert "disabled".

2. On page 2, line 9, following "who", insert ", whether or not he is a veteran as defined in this section,".

3. On page 1, line 20, following "veterans", insert "and disabled veterans,"

4. On page 1, line 24, following "veterans", insert ", disabled veterans,".

REPRESENTATIVE ADDY moved the adoption of the amendments and Representative Keyser seconded the motion. The motion carried unanimously.

REPRESENTATIVE RAMIREZ moved the committee amend the Statement of Intent on page 3, lines 13 through 16 by striking everything on these lines following "applicants" on line 13. The motion was seconded by Representative Jensen. The motion carried unanimously.

CHAIRMAN BROWN indicated he had Senator Towe's amendments if someone would care to offer them. He requested Senator Towe to briefly explain his amendments.

SENATOR TOWE informed the committee that he was concerned about the retroactive provision as he felt it was almost certain to be declared unconstitutional and then they would end up with nothing. He explained that instead of a retroactive provision, he thought they can be most effective in court by saying what we are doing here is what we thought we had all the time and this would be a legislative declaration of intent. This is what the legislature always had thought was in existence, and except for the attorneys' fees, there is nothing new and that would declare the existing situation.

He continued that amendment #3 takes a different approach. If the retroactive clause is declared unconstitutional, then you are left with nothing but there is one area in the old law and the old language in particular and that is limiting the statute of limitations. He advised, at the present time, if they declared that one unconstitutional, then we are exposed for two more years, at least (whatever the existing statute of limitations is) and anybody can pull in claims anywhere they want. In this amendment, he said he has proposed they go back to the original language the interim committee proposed. In amendment #5, it says, in effect, that section 16 is effective only upon a court finding--that the retroactive provisions of section 14 are invalid. Senator Towe explained that if section 14 fails, then you have 16 to fall back on and the most significant part is that you have a 60-day limitation so that 60 days from when this bill passes, there will be no more claims. He felt that would hold up. He noted Chairman Brown has expressed some concern about putting in two retroactive provisions and that would be an open invitation to the courts to declare the first one unconstitutioanl, but he suggested that what they have already is a red flag raised about as high as you can raise it.

CHAIRMAN BROWN commented that basically what they have is a disagreement among lawyers and he moved the committee adopt amendments #1 and #2 because he felt it was important to clarify the intent of the legislature in regards to this retroactive clause. The motion was seconded by Representative Addy. The motion carried with Representatives Hannah and Daily voting no.

REPRESENTATIVE ADDY moved SB 2 BE CONCURRED IN, AS AMENDED. Representative Iverson seconded the motion. The motion carried with Representative Hannah, Representative Daily and Representative Jensen voting no.

REPRESENTATIVE EUDAILY noted that in HB 8, on page 6, where it gives the exclusions, they eliminated vo-tech schools, but they didn't put them in the exempted part, so they really are not mentioned anywhere now and it will probably take a court case to determine whether they are in or out or whether school districts include vo-tech centers. He asked if it was not their intention when they took them out of the other parts of the bill to include them under the exempted part.

CHAIRMAN BROWN said, if it was acceptable to the committee, that this be included in his nine amendments that they approved, as this was the intent. There was no objection from the committee.

REPRESENTATIVE KEYSER moved the meeting be adjourned at 11:16 a.m. Representative Iverson seconded the motion and all voted aye.

DAVE BROWN, Chairman
House Judiciary Committee

Alice Omang, Secretary

SPECIAL SESSION

ROLL CALL VOTE ------ HOUSE JUDICIARY COMMITTEE

	Date:11/15 No: Ramirez 10/5 am.	Date: 11/15 No: Brand's amendment	Date: 11/15 No: Sands' amendment	Date: No:	Date No:	Date No:	Date: No:
Rep. Dave Brown	yes	yes	no				
Rep. Kelly Addy	yes	no	no				
Rep. Toni Bergene	yes	no	yes				
Rep. Jan Brown	yes	no	no				
Rep. Aubyn Curtiss	no	yes	yes				
Rep. Fritz Daily	no	yes	yes				
Rep. Paula Darko	yes	no	no				
Rep. Ralph Eudaily	yes	no	yes				
Rep. Carol Farris	yes	no	no				
Rep. Tom Hannah	no	yes	yes				
Rep. Dennis Iverson	yes	yes	no				
Rep. Jim Jensen	yes	no	no				
Rep. Roland Kennerly	no	no	no				
Rep. Kerry Keyser	no	yes	yes				
Rep. Jack Ramirez	yes		no				
Rep. Ted Schye	yes	no	no				
Rep. Carl Seifert	ex.	ex.	ex.				

(Continued - next page)

SPECIAL SESSION

ROLL CALL VOTE ------ HOUSE JUDICIARY COMMITTEE

(Continued)

	Date: 11/15 No: Ramirez amendment	Date: 11/15 No: Brand's amendment	Date: 11/15 No: Sands' amendment	Date: No:	Date No:	Date No:	Date: No:
Rep. Gary Spaeth	no	yes	yes				
Rep. Dennis Veleber	no	no	no				
TOTALS	11 ayes 7 noes	8 ayes 10 noes	7 ayes 11 noes				

Exhibit
SB 2
12/15/83

WOMEN'S LOBBYIST FUND

Box 1099
Helena, MT 59624
449-7917

TESTIMONY OF BRENDA SCHYE, WOMEN'S LOBBYIST FUND, TO THE HOUSE JUDICIARY COMMITTEE ON SB 2, DEC. 15, 1983

As I have testified to this committee previously, the Women's Lobbyist Fund has always supported employment preference for veterans and the handicapped. In spite of our concern that such laws can put women at a further disadvantage in the job market, we have recognized that veterans face a reintegration process when they return to civilian life. A hiring preference during this transitional time seems to be an appropriate way for our state to assist veterans with their re-entry.

We believe it is possible to balance the employment needs of veterans with the employment needs of women and non-veteran men. We felt that the interim committee bill contained such a balance. However, the scale has now been tipped.

You may recall that the Women's Lobbyist Fund has been supporting a time limit of five years following separation from service, or one year following the date of this act, whichever is later. We accepted a lifetime preference with a one-time successful use provision as an alternative. Yesterday, we agreed with several legislators to support a preference of ten years, provided that the "grandfather" clause be limited to only two years. This would provide some consideration for veterans whose 10-year limit has already expired, giving them an additional two years in which to claim preference. As the bill now stands, that grandfather clause is ten years. This means that WW II veterans, who have already enjoyed preference for nearly forty years, will have preference until 1994. They will retire before their preference expires. Korean conflict veterans have had preference for approximately 30 years and some Viet Nam veterans for as much as 19 years. For many of those individuals, there is no amount of money, home loans, educational benefits, or job preference which can begin to make up for the sacrifices they have made. But let us keep in mind that while society as a whole will always have an unpaid debt of gratitude to those individuals, our role as a state (as recognized in the purpose section of this bill) should be to help them re-enter the civilian workforce. A hiring preference during this transitional time is an appropriate way to accomplish that.

Let us remember, at the same time, that there are other groups in our state that are also disadvantaged in the labor market. To extend a veterans' hiring preference beyond the transitional period when they need it is going to put all non-preferred persons at a further disadvantage than they already have.

The 1980 Montana census data showed that the average household income for a family with a veteran was $21,000. They average income for a family with a woman as head of household was $9,000. In light of such information, it seems difficult to deny that there is more to be kept in mind than the fact that we want veterans to have jobs. We want all people to have jobs.

It has never been the intention of the Women's Lobbyist Fund to pit one disadvantaged group against another, although some people seem to have enjoyed such a divisive approach. All we ask is that you consider what is truly fair to

Catherine Lynn Robson, President; Sharon Ann Ashton, Vice President; Toni A. Scharff, Treasurer; Linda McNiel, Secretary; Lynn Scott, Communications Officer

everyone--all Montanans, whether they be male or female, veteran or non-veteran, minority or majority, employed or unemployed, as well as their children. We all have the same basic needs, so let us approach this difficult task with thoughts about what is best and what is fair for everyone.

In the last 24 hours, some individuals have assured me that "no veterans are going to attempt to obtain jobs under the grandfather clause anyway, because they don't need them--but it will make the veterans happy". I cannot believe that veterans want token gestures, nor can I believe that that is what this Legislature wants to extend. Make this a meaningful bill, that gives assistance when and where it is needed.

The Women's Lobbyist Fund has made a sincere effort and worked in good faith with all interested parties in developing an employment preference bill that is equitable. If you can restore the balance to this bill, we will apply all our efforts to its passage. But as it stands now, we cannot support it.

Exhibit 2
SB-2
12/15/83

Equal Employment Opportunity Commission

Uniform Employee Selection Guidelines — Interpretation and Clarification — (Questions and Answers)

¶ 4175

The following series of questions and answers are designed to clarify and interpret, but not to modify, the uniform Guidelines on Employee Selection Procedures that were adopted on August 25, 1978, by the Equal Employment Opportunity Commission (29 CFR 1607), Office of Personnel Management (5 CFR 300), U.S. Department of Justice (28 CFR, Ch. 1, Part 50), U.S. Treasury Department (31 CFR, Ch. 1, Part 51) and the Office of Federal Contract Compliance Programs (41 CFR. Ch. 60, Part 68-3). Supplemental questions and answers (No. 91 through 93) became effective as of May 2, 1980 (45 F.R. 29350).

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8. Q. What is the relationship between Federal equal employment opportunity law, embodied in these Guidelines, and State and Local government merit system laws or regulations requiring rank ordering of candidates and selection from a limited number of the top candidates?

A. The Guidelines permit ranking where the evidence of validity is sufficient to support that method of use. State or local laws which compel rank ordering generally do so on the assumption that the selection procedure is valid. Thus, if there is adverse impact and the validity evidence does not adequately support that method of use, proper interpretation of such a state law would require validation prior to ranking. Accordingly, there is no necessary or inherent conflict between Federal law and State or local laws of the kind described.

Under the Supremacy Clause of the Constitution (Art. VI, Cl. 2), however, Federal law or valid regulation overrides any contrary provision of state or local law. Thus, if there is any conflict, Federal equal opportunity law prevails. For example, in *Rosenfeld* v. *So. Pacific Co.*, 444 F. 2d 1219 (9th Cir., 1971), the court held invalid state protective laws which prohibited the employment of women in jobs entailing long hours or heavy labor, because the state laws were in conflict with Title VII. Where a State or local official believes that there is a possible conflict, the official may wish to consult with the State Attorney General, County or City attorney, or other legal official to determine how to comply with the law.

12/15/83

Estimates of Persons Eligible for Preference
(Numbers of Persons in Population Ages 16-64)*

Current Eligibles

	Veterans	108,590**
	Spouses of Vets	87,980
	Dependents of Vets (16-18)	19,000
	Disabled Civilians	24,400
	(est)	239,970

Committee Proposal

During Transition Period:

	War Vets	105,093
(.4% of all Vets)	Campaign Vets (est)	1,000
(30%+)	Disabled Vets and Spouses of Disabled Vets, etc.	3,800
	Disabled Civilians	24,400
	(est)	134,293

After Transition Period:

	Disabled Vets and Spouses of Disabled Vets, etc.	3,800
(Sep. in last 10 yrs.)	Campaign/War Vets (est)	1,000
	Disabled Civilians	24,400
	(est)	29,200

*Source - U. S. Census, Veterans Administration.

**some may not have met the 180 day peace time service requirement would also include retirees.

DEPARTMENT OF ADMINISTRATION
PERSONNEL DIVISION

TED SCHWINDEN, GOVERNOR — ROOM 130, MITCHELL BUILDING

STATE OF MONTANA

(406) 444-3871 — HELENA, MONTANA 59620

TO: Dennis M. Taylor
Administrator

FROM: Mark Cress, Chief
Employee Relations Bureau

DATE: December 15, 1983

SUBJECT: The Cost of Using Scored Procedures in State Agencies

My staff and I have reviewed actual costs of using scored procedures in other jurisdictions and have found some information which might give an indication of the expense.

The cost of maintaining the Merit System Bureau in its last year of operation (1980) was $200,000. This provided scored procedures for only 20% (2,000) of the state positions. I doubt whether it would cost 5 times that to serve 10,000 positions, but I'm sure it would be more than the $200,000 used by the Merit System Bureau.

The 1979 Annual Statistical Report of the United States Office of Personnel Management reports that states with statewide merit systems using a variety of scored procedures had a average cost of $68.50 per position served. This figure is very close to the $66.00 per position experienced by the Montana Merit System Bureau in 1980. This would translate to approximately $685,000 for 10,000 positions in the executive branch without considering the 34% inflation factor since 1979.

The State of Idaho uses a variety of scored procedures in a statewide selection system. Their cost of maintaining their system in 1982 was $238.60 per vacancy filled. The executive branch in Montana has approximately 2,000 initial hires per year to permanent full-time positions. This would mean $477,240 per year. This is to maintain, not to develop scored procedures.

I'm not sure how these figures would translate to the quantified selection system in Montana envisioned by Representative Sands amendment to HB 8, but they do indicate that the $181,000 per year estimate may be overly conservative.

MC/bmp

Two Proposals for An Increased Role for the State Personnel Division in Selection and Recruitment in State Government:

After researching the public sector personnel management systems which operate in several states and the federal government, the Personnel Division recommends a system for Montana that combines some Central Personnel responsibility with some Agency responsibility. Central Personnel would be responsible for examination development and recruitment wherever volume made this efficient. Central Personnel would also set minimum standards for other selection actions. Agencies would have flexibility in designing policies and procedures provided minimum standards were met.

A. Option #1 - An Optimal Proposal.

Under optimal conditions a central recruitment and selection program could provide the following services:

1. Set minimum standards for recruitment and selection including requirements for specific selection measures.

2. Review agency procedures for compliance with standards.

3. Delegate authority to agencies to develop procedures where agencies have sufficient personnel resources and have proven expertise. Provide technical assistance as needed.

4. Provide more extensive development assistance to agencies without professional personnel staff.

5. Review all written exams currently in use; approve or discontinue use.

6. Develop written exams where classes or knowledges, skills, and abilities are present in sufficient numbers within an agency or across state agencies, e.g., clerical classes are numerous and accounting knowledge is required across state agencies.

7. Investigate possibility of buying or adapting examinations from other jurisdictions or professional test development services.

8. Provide selection training to state supervisors.

The above duties could be performed by a staff of six, which is an increase of five FTE. The following staffing pattern would be required:

(1) Recruitment and Selection Supervisor - Grade 16

Responsible for statewide recruitment and selection program; sets policies and procedures for recruitment and selection; supervises staff; acts as test development specialist.

(2) Test Development Specialists - Grade 15

Perform job analysis as a basis for construction of employment tests; select, construct, analyze and revise written, oral, performance, and other tests; plan and supervise validity studies.

(2) Recruitment and Selection Specialists - Grade 14

Advise agencies on the construction and design of vacancy announcements; coordinate recruitment for specialist positions or other positions common across state agencies; work with school, colleges, and universities to meet labor force needs of state; develop, assist in the development of, or review development of a variety of selection devices; present training program in the area of recruitment and selection; assist test development specialist with development of written exams.

(1) Administrative Clerk - Grade 8

Type correspondence and other selection materials; arrange appointments and meetings; provide routine information to callers and visitors; establish and maintain files and records; perform related clerical work as required.

Budget Option #1:

Personal Services (FY 85, Step 3)	
Salaries (5 FTE)	$126,864
Benefits	24,104
Total	$150,968
Operating Expenses	30,000
Total	$180,968

B. Option #2 - A Minimum Service Proposal.

If only three additional FTE were authorized, a partial implementation of the recruitment and selection program would be possible:

1. Set minimum standards for recruitment and selection including requirements for specific selection measures.

2. Periodically audit agency procedures for compliance with minimum standards.

3. Provide technical assistance in the areas of recruitment and selection.

4. Continue to provide training in the areas of recruitment and selection.

5. Review written, oral, and performance exams currently in use; revise or discontinue use as appropriate.

6. Investigate possibility of buying or adapting examinations from other jurisdictions or professional test development services.

The above services could be provided with the addition of two Test Development Specialists, Grade 15, and one clerical support person, Grade 8.

Budget Option #2:

Personal Services (FY 85, Step 3)	
Salaries (3 FTE)	$59,372
Benefits	11,281
Total	$70,653
Operating Expenses	15,000
Total	$85,653

Approved by Towe

Proposed amendment to Senate Bill 2.

1. Page 1, line 19.
Following: "Purposes."
Insert: "(1)"

2. Page 1, line 25.
Following: line 24
Insert: "(2) The provisions of [sections 1 through 8], except for costs and attorney fees, are intended to remedy the uncertainty, windfalls, burden on the courts, burden on the state treasury, and public concern caused by the interpretation of the former preference provisions in conflict with long-established customs and practices by public hiring authorities. It is the legislature's finding that the provisions of [sections 1 through 8], except for costs and attorney fees, declare the original intent of 10-2-201 through 10-2-206."

3. Page 15, line 23.
Following: line 22
Insert: "Section 16. Savings clause -- statute of limitations. (1) Subject to the applicable statute of limitations and to subsection (3), a claim for a violation of 10-2-201 through 10-2-206, whether or not it is pending in court on the effective date of this act, may be pursued under and must be governed by 10-2-201 through 10-2-206.

(2) However, the only relief that may be granted on a claim described in subsection (1) is that provided in section 8(4)(c)(iii) of this act, and the court may grant no other relief, including that provided in 10-2-206 or any judicial construction of 10-2-206.

(3) A claim under 10-2-201 through 10-2-206 must be filed within 60 days after [the effective date of this section]."
Renumber: Subsequent sections.

4. Page 16, line 5.
Following: "act"
Insert: ", except as provided in subsection (3),"

5. Page 16, line 10.
Following: line 9
Insert: "(3) Section 16 is effective only upon a court finding the retroactive provisions of section 14 of this act invalid."

SOFI/2/Greg

Proposed amendment to Senate Bill 2.

1. Page 9, line 19.
Strike: "10"
Insert: "5"

DEPARTMENT OF ADMINISTRATION
PERSONNEL DIVISION

TED SCHWINDEN, GOVERNOR — ROOM 130, MITCHELL BUILDING

STATE OF MONTANA

(406) 444-3871 — HELENA, MONTANA 59620

SUMMARY OF STATE EMPLOYEES VETERAN'S STATUS

Management - Jobs	543 Responding	Total	203 Vets 35 Sp *	37.4 6.4
			238	43.8%
Professional - Jobs	2660 Responding		838 Vets 221 Sp	31.5 8.3
			1059	39.8%
Technician - Jobs	1584 Responding		335 Vets 231 Sp	21.1 14.6
			568	35.7%
Protective Service	484 Responding		258 Vets 1 Sp	53.3 .2
			259	53.5%
Clerical Jobs	1471 Responding		118 Vets 385 Sp	8.0 26.2
			503	34.2%
TOTAL	8537 ** Responding		2340 Vets 1034 Sp	27.4 12.1
			3374	39.5%

* Includes Dependents

** Not all job groups are reproduced

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 2 DATE December 15, 1983

SPONSOR SENATOR MAZUREK

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Jim Nys	E. Helena	Personnel D.U		
Bob Liston	Helena	Governors Com. for Handicapped	✓	
Bill Wilson	HELENA	VFW		
Brenda Schye	Helena	Womens Lobbyist Fund		
Chip Erdman	Helena	MT School Bd Assoc	✓	
Nancy Walter	Helena	Mt. Educ. Assn.	✓	
Pam Kinsella	Helena	State Personnel Div.		
Pat Schaffer	Helena	Attorney General's Office		
Bob Raines	Helena	Himself		
Carol Endicott	Billings			
Dick Bonny	Helena	Office of Comm'r Higher Ed		
Elsie Redlin	Lambert	Board of Regents		
Dave Depew	Helena	DPHE		
Dean Switzer		Dept 54		
Jeanne Hollister	Helena	Women's Pol. Caucus Fund		
Jerry Emmett	Helena	Womens Lobbyist Fund		
Ann Gilchrist Jasper	Helena	Womens Lobbyist Fund	✓	
Bernice Gibson	Helena	MACC		
DENNIS M. TAYLOR	HELENA	PERSONNEL D.U/DOA	✓	
Mark Cress	Helena	State Personnel Div.	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33
1-83

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 2 DATE December 15, 1983

SPONSOR SENATOR MAZUREK

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Bruce Swift	Hamilton MT.	Dist #1 - Reps		✓
Tom Antonietti	Helena	USDC - VETS		
Hugh Cumming	Helena	American Legion of Mt.		

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

STANDING COMMITTEE REPORT

December 15, 1983

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 2

third reading copy (blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; AMENDING SECTIONS 10-2-402, 49-3-103, AND 49-3-201, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

Respectfully report as follows: That SENATE Bill No. 2

be amended as follows: (See attached sheets 2 through 10)

~~DO PASS~~
XXXXX

DAVE BROWN, Chairman.

STATE PUB. CO
Helena, Mont.

Amend HB 8 as follows:

Remove Residency/Citizenship

1. Page 8, line 14.
Following: "unless"
Strike: ":" through "(4)" on line 22.
Insert: "he entered the service while residing within the state of Montana and"

Eligibility/non-regular components

1. Page 7, line 4
Following: "OF"
Insert: "a regular component of"

Remove 30% disability

1. Page 2, line 13.
Following: "disability"
Insert: "as"

2. Page 2, lines 14 and 15.
Strike: "to be 30% or more disabling"

Honorable discharge

1. Page 2, line 11.
Strike: "under honorable conditions"
Insert: "by honorable discharge"

2. Page 6, following line 12
Strike: subsection (9) in its entirety
Renumber: subsequent subsections

Mental impairment

1. Page 3, line 9.
Following: "physical"
Insert: "or mental"

STATE PUB. CO.

Chairman.

Include university system

1. Page 4, following line 9.
Insert: "(iv) a unit, as defined in 20-25-201, for a position within the Montana university system;
(v) the office of commissioner of higher education for a position within that office;
(vi) a college for a position within that college;"
Renumber: subsequent subsections.

2. Page 4, line 16.
Strike: "(V)"
Insert: "(viii)"

3. Page 4, line 19.
Strike: "(V)"
Insert: "(viii)"

4. Page 5, line 22.
Following: "~~university,~~"
Insert: "college, including a community college, university,"

5. Page 6, lines 1 and 2.
Strike: "A COMMUNITY COLLEGE,"

6. Page 6, lines 3 and 4.
Strike: "THE" through "SYSTEM," on line 4.

Remove compliance report

1. Page 15, following line 6.
Strike: Section 14 in its entirety
Renumber: subsequent sections

2. Page 16, line 8.
Strike: "15"
Insert: "14"

Duration of preference

1. Page 9, line 19.
Strike: "10"
Insert: "5"

Technical amendments

1. Page 1, line 20.
Following: "veterans"
Insert: "and disabled veterans"

2. Page 1, line 24.
Following: "veterans"
Insert: ", disabled veterans,"

3. Page 2, line 9.
Following: "individual"
Insert: ", whether or not he is a veteran as defined in this section,"

4. Page 2, line 21.
Following: "a"
Insert: "disabled"

Legislative intent

1. Page 1, line 19.
Following: "Purposes."
Insert: "(1)"

2. Page 1.
Following: line 24
Insert: "(2) The provisions of [sections 1 through 8], except for costs and attorney fees, are intended to remedy the uncertainty, windfalls, burden on the courts, burden on the state treasury, and public concern caused by the interpretation of the former preference provisions in conflict with long-established customs and practices by public hiring authorities. It is the legislature's finding that the provisions of [sections 1 through 8], except for costs and attorney fees, declare the original intent of 10-2-201 through 10-2-206."

Clarification of bar to enforcement action

1. Page 10, line 10.
Following: "claim"
Insert: "for a position"

2. Page 10, line 11
Following: "action"
Insert: "in regard to that position"

5 of 10

19

Show cause hearing evidentiary standard

1. Page 11, line 8.
Strike: "The"
Insert: "At the hearing, the"

2. Page 11, line 9.
Following: "of"
Strike: remainder of line 9 through "hired" on line 10.
Insert: "proving by a preponderance of the evidence that the employer made a reasonable determination pursuant to subsection (8) of [section 3] and the applicant has the burden of proving by a preponderance of the evidence that he is a preference eligible applicant"

3. Page 11, line 17.
Following: "(4)(c)(i)"
Insert: "and the court has found that the applicant is a preference eligible applicant."

AND AS AMENDED, BE CONCURRED IN

Chairman.

6 of 10

~~HB 6~~

House Judiciary Committee Amendments to Senate Bill 2
Statement of Intent: Strike entire Senate version.
Insert:

STATEMENT OF INTENT

SENATE BILL 2
~~HOUSE BILL 6~~

A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied as a "tie breaker" among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. WHERE APPLICABLE ON SCORED EXAMS OR STRUCTURED INTERVIEWS, THE RANGE FOR SUBSTANTIALLY EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS. Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a

STATE PUB. CO.
Helena, Mont.

public employer.

A statement of intent is also required for this bill because section 9 requires the department of administration to adopt rules implementing sections 1 through 10 and to consult with the department of social and rehabilitation services in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to sections 1 through 10.

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the following matters and take into account the following considerations.

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a Montana resident when he entered the service, veteran, disabled veteran, handicapped person, or eligible spouse. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants.

(2) Handicapped persons -- certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical or mental impairment that substantially limits one or more major life activities, and outline in what instances a physical or mental impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a combination of a statement of general principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Honorable discharges. The legislature intends the rules to apply federal law in defining honorable discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the selection process for a job should a court order the selection process reopened, and include a method of giving notice to those who applied for the job informing them of

the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10.

BERGENE

COMMITTEE OF THE WHOLE AMENDMENT

1:10 p.m.
12-15-83

MR. CHAIRMAN: I MOVE TO AMEND SENATE Bill No 2

THIRD reading copy (BLUE color) AS FOLLOWS:

Page 8, line 5
Following: "veteran"
Insert: "or handicapped person"

ADOPT
REJECT

Toni R Berg
BERGENE

STATE PUB. CO.
Helena, Mont

JOURNAL

PAVLOVICH

COMMITTEE OF THE WHOLE AMENDMENT

1:15 p.m.
12-15-83

MR. CHAIRMAN: I MOVE TO AMEND SENATE Bill No. 2

THIRD reading copy (BLUE color) AS FOLLOWS:

Amend House Judiciary
Committee Amendments 12-15

On page 3 of 10 under "duration of preference" on insertion line

Strike: "5"
Insert: "10"

ADOPT
REJECT

Pavlovich
PAVLOVICH

STATE PUB. CO.
Helena, Mont

JOURNAL

KITSELMAN

COMMITTEE OF THE WHOLE AMENDMENT

4:30 p.m.
12-15-83

MR. CHAIRMAN: I MOVE TO AMEND SENATE Bill No 2

THIRD reading copy (BLUE color) AS FOLLOWS:

1) House Judiciary Committee Amendments of 12-15, under "Remove residency/citizenship" on page 2 of 10:
Strike: Amendment #1

2) Page 8, line 11
Following: "requirements."
Insert: "(1)"

3) Page 8, line 14
Following: "unless"
Strike: ":" through "(4)" on line 22

4) Page 8, following line 24
Insert: "(2) In addition to the eligibility requirement provided in subsection (1), any veteran whose service in the armed forces forms the basis of an employment preference under [sections 1 through 10] must have claimed Montana as his home of record at entry into the armed forces, as indicated on his certificate of release or discharge from active duty (DD form 214)."

ADOPT
REJECT

14

KITSELMAN

STATE PUB. CO.
Helena, Mont.

JOURNAL

BRAND

19

Amendments to Statement of Intent

House Judiciary Committee Page 6 of 10, line 16:

Following: "job."
Insert: "Where applicable on scored exams or structured interviews, the range for substantially equal will be within 5 percentage points."

ADOPT
REJECT

STATE PUB. CO.
Helena, Mont.

BRAND

COMMITTEE OF THE WHOLE AMENDMENT

1:30 p.m.
12-15-83

MR. CHAIRMAN: I MOVE TO AMEND SENATE Bill No. 2

THIRD reading copy (BLUE color) AS FOLLOWS:

Page 6, line 12
Following: "persons."
Insert: "In a scored selection procedure the range for substantially equal will be within 5 percentage points."

Amendments to Statement of Intent attached.

ADOPT
REJECT

Joe Brand

BRAND

STATEMENT OF INTENT

SENATE BILL 2

(Strike entire statement of intent and insert:)

A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied as a "tie breaker" among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. WHERE APPLICABLE ON SCORED EXAMS OR STRUCTURED INTERVIEWS, THE RANGE FOR SUBSTANTIALLY EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS. Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a public employer.

A statement of intent is also required for this bill because section 9 requires the department of administration to adopt rules implementing sections 1 through 10 and to consult with the department of social and rehabilitation services in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to

sections 1 through 10.

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the following matters and take into account the following considerations.

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a Montana resident when he entered the service, veteran, disabled veteran, handicapped person, or eligible spouse. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants.

(2) Handicapped persons -- certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical or mental impairment that substantially limits one or more major life activities, and outline in what instances a physical or mental impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a

combination of a statement of general principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Honorable discharges. The legislature intends the rules to apply federal law in defining honorable discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the selection process for a job should a court order the

selection process reopened, and include a method of giving notice to those who applied for the job informing them of the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10.

SENATE BILL NO. 2

INTRODUCED BY MAZUREK, H. HAMMOND, TVEIT, HAFFEY

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; RECONCILING THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES; AMENDING ~~SECTIONS~~ SECTION 10-2-402, ~~49-3-103, AND 49-3-201~~, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; PROVIDING FOR PARTIAL RETROACTIVE EFFECT OF THE REPEAL; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

NEW SECTION. Section 2. Purposes. (1) The purposes of [sections 1 through 10] are to reward RECOGNIZE veterans AND DISABLED VETERANS for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans, DISABLED VETERANS, and handicapped persons.

(2) THE PROVISIONS OF [SECTIONS 1 THROUGH 8], EXCEPT FOR COSTS AND ATTORNEY FEES, ARE INTENDED TO REMEDY THE UNCERTAINTY, WINDFALLS, BURDEN ON THE COURTS, BURDEN ON THE STATE TREASURY, AND PUBLIC CONCERN CAUSED BY THE INTERPRETATION OF THE FORMER PREFERENCE PROVISIONS IN CONFLICT WITH LONG-ESTABLISHED CUSTOMS AND PRACTICES BY PUBLIC HIRING AUTHORITIES. IT IS THE LEGISLATURE'S FINDING THAT THE PROVISIONS OF [SECTIONS 1 THROUGH 8], EXCEPT FOR COSTS AND ATTORNEY FEES, DECLARE THE ORIGINAL INTENT OF 10-2-201 THROUGH 10-2-206.

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual, WHETHER OR NOT HE IS A VETERAN AS DEFINED IN THIS SECTION, who:

(a) served on active duty;

(b) has been separated from service ~~under honorable conditions~~ BY HONORABLE DISCHARGE; and

(c) suffers a service-connected disability AS

determined by the United States veterans administration to ~~be 30% or more disabling~~.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a DISABLED veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical OR MENTAL impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

~~(iv) a unit as defined in 20-25-201, for a position within the Montana university system;~~

~~(v) the office of commissioner of higher education for a position within that office;~~

~~(vi) a college for a position within that college;~~

~~(vii) a center or program for a position within the postsecondary vocational-technical education system;~~

(IV) A UNIT, AS DEFINED IN 20-25-201, FOR A POSITION WITHIN THE MONTANA UNIVERSITY SYSTEM;

(V) THE OFFICE OF COMMISSIONER OF HIGHER EDUCATION FOR A POSITION WITHIN THAT OFFICE;

(VI) A COLLEGE FOR A POSITION WITHIN THAT COLLEGE;

~~(vi)~~ ~~(VII)~~ a city or town for a municipal position, including a city or municipal court position; and

~~(vii)~~ ~~(VIII)~~ a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)~~(vii)~~ ~~(VIII)~~ of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)~~(vii)~~ ~~(VIII)~~ of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, COURT REPORTER, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such

as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, ~~college---including----a----community----college~~ ~~posts-condary---vocational-technical---center---or--program~~ ~~university~~ COLLEGE, INCLUDING A COMMUNITY COLLEGE, UNIVERSITY, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, ~~a COMMUNITY--COLLEGE~~, A POSTSECONDARY VOCATIONAL-TECHNICAL CENTER OR PROGRAM, ~~THE-BOARD-OF-REGENTS-OF-HIGHER-EDUCATION~~, ~~THE--MONTANA--UNIVERSITY-SYSTEM~~, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(8) "Substantially equal qualifications" means the

qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons. IN A SCORED SELECTION PROCEDURE THE RANGE FOR SUBSTANTIALLY EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS.

~~(9)--"Under-honorable-conditions"-means-a-discharge--or separation-from-active-duty-characterized-as-under-honorable conditions.--The--term--includes--honorable--discharges--and general--discharges--but--does--not---include---dishonorable discharges--or-other-administrative-discharges-characterized as-other-than-honorable.~~

~~(10)~~(9) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense; and

(ii) has been separated from service under honorable conditions.

(b) The term does not include a ~~person-receiving retirement-pay-from-the-United-States--based--on--length--of military--service~~ RETIRED MEMBER OF A REGULAR COMPONENT OF THE UNITED STATES ARMED FORCES WHO IS ELIGIBLE FOR OR RECEIVING A MILITARY RETIREMENT ALLOWANCE BASED ON LENGTH OF

SERVICE AND DOES NOT INCLUDE ANY OTHER RETIRED MEMBER OF A PUBLIC RETIREMENT SYSTEM, EXCEPT SOCIAL SECURITY, THAT IS SUPPORTED IN WHOLE OR IN PART BY TAX REVENUES.

~~(11)~~(10) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran OR HANDICAPPED PERSON over any other preference eligible applicant with substantially equal

qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

NEW SECTION. Section 5. Eligibility requirements. (1) No veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

~~(i) he is a United States citizen;~~

~~(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;~~

~~(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and~~

~~(4)~~ he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

(2) IN ADDITION TO THE ELIGIBILITY REQUIREMENT PROVIDED IN SUBSECTION (1), ANY VETERAN WHOSE SERVICE IN THE ARMED FORCES FORMS THE BASIS OF AN EMPLOYMENT PREFERENCE UNDER [SECTIONS 1 THROUGH 10] MUST HAVE CLAIMED MONTANA AS HIS HOME OF RECORD AT ENTRY INTO THE ARMED FORCES, AS INDICATED ON HIS CERTIFICATE OF RELEASE OR DISCHARGE FROM

ACTIVE DUTY (DD FORM 214).

NEW SECTION. Section 6. Certification of handicapped persons. The department of social and rehabilitation services shall certify persons as handicapped for the purpose of employment preference as provided in [sections 1 through 10].

NEW SECTION. Section 7. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for ~~life. However, once he has obtained a~~ PERMANENT ~~position because of the application of the employment preference, he may not use the preference again~~ NO LONGER THAN 10 YEARS FOLLOWING SEPARATION FROM SERVICE OR FOR NO LONGER THAN ~~10~~ 5 10 YEARS FOLLOWING [THE EFFECTIVE DATE OF THIS ACT], WHICHEVER IS LATER.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment preference for as long as the person is missing in action or a prisoner of war.

NEW SECTION. Section 8. Enforcement of preference. (1) A public employer shall, by posting ~~and~~ OR on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim FOR A POSITION is a complete defense to an action IN REGARD TO THAT POSITION under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. ~~The~~ AT THE HEARING, THE public employer has the burden of ~~making a clear showing that the applicant was not substantially equally qualified with the person hired~~ PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT THE EMPLOYER MADE A REASONABLE DETERMINATION PURSUANT TO SUBSECTION (8) OF [SECTION 3] AND THE APPLICANT HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE IS A PREFERENCE ELIGIBLE APPLICANT.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i) AND THE COURT HAS FOUND

THAT THE APPLICANT IS A PREFERENCE ELIGIBLE APPLICANT, the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10]."

~~Section 12. Section 49-3-103, MCA, is amended to read:~~

~~"49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:~~

~~(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap:~~

~~(a) when based on the preference provided in [sections 1 through 10];~~

~~(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or~~

~~(c) where the differentiation is based on reasonable factors other than age;~~

~~(2)--from--observing-the-terms-of-a-bona-fide-seniority system-or-any-bona-fide-employee-benefit--plan,--such--as--a retirement,--pension,--or--insurance--plan,--which--is-not-a subterfuge-to-evade-the-purposes--of--this--chapter,--except that--no-such-employee-benefit-plan-shall-excuse-the-failure to-hire-any-individual;-or~

~~(3)--from--discharging--or--otherwise--disciplining--an individual-for-good-cause."~

~~Section-13.--Section-49-3-201,-MCA,-is-amended-to-read:~

~~"49-3-201.--Employment--of--state--and-local-government personnel.--(1)-State~ Except--as--provided--in--[sections--1 through--10],--state--and--local--government--officials--and supervisory-personnel-shall-recruit,-appoint,-assign,-train, evaluate,-and-promote-personnel-on-the-basis--of--merit--and qualifications--without--regard--to--race,--color,-religion, creed,-political-ideas,-sex,-age,-marital--status,--physical or-mental-handicap,-or-national-origin.

~~(2)--All--state--and-local-governmental-agencies-shall:~

~~(a)--promulgate-written-directives-to--carry--out--this policy--and--to--guarantee-equal-employment-opportunities-at all-levels-of-state-and-local-government;~

~~(b)--regularly--review--their--personnel--practices--to assure-compliance;-and~

~~(c)--conduct---continuing---orientation---and--training programs--with--emphasis--on--human---relations---and---fair

~~employment-practices.~

~~(3)--The-department-of-administration-shall-insure-that the--entire--examination--process,--including--appraisal--of qualifications,-is-free-from-bias.~

~~(4)--Appointing--authorities--shall--exercise--care--to insure-utilization-of-minority-group-persons."~

NEW SECTION. SECTION 12. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS CHAPTER.

NEW SECTION. SECTION 13. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS CHAPTER.

~~NEW-SECTION.--SECTION-14.--SUBMISSION--OF--DATA.---EACH PUBLIC-EMPLOYER-SHALL-SUBMIT-TO-EACH-REGULAR-SESSION-OF--THE LEGISLATURE--A--REPORT--CONTAINING--DATA-REGARDING-VETERANS' EMPLOYMENT-UNDER-THE-PROVISIONS-OF-THIS-ACT.~

NEW SECTION. Section 14. Repealer. Subject to section ~~16(3)(a)~~ of this act, sections ~~10-2-201--through--10-2-206,~~ MCA, ~~--are-repealed.~~ SECTIONS 10-2-201 THROUGH 10-2-206, MCA, ARE REPEALED. THIS REPEAL APPLIES RETROACTIVELY TO BAR ANY CLAIM OF VIOLATION OR APPLICATION OF 10-2-201 THROUGH

10-2-206 THAT HAS NOT BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS ACT]. CLAIMS UNDER 10-2-201 THROUGH 10-2-206 THAT HAVE BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS ACT] ARE ENFORCEABLE. NO CLAIM FOR A VIOLATION OF 10-2-201 THROUGH 10-2-206 MAY BE MADE UNDER [SECTION 8] OF THIS ACT.

NEW SECTION. Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 16. Effective date -- applicability ~~--saving clause~~. (1) This act is effective on passage and approval.

(2) Except as provided in ~~subsection (3)(b)~~ SECTION ~~14~~ 15 14, this act applies only to positions that are filled after the effective date of this act.

~~(3)(a) Subject to the applicable statute of limitations and to subsection (3)(c), a claim for violation of 10-2-201 through 10-2-206, whether or not it is pending in court on the effective date of this act, may be pursued under and must be governed by 10-2-201 through 10-2-206.~~

~~(b) However, the only relief that may be granted on a~~

~~claim described in subsection (3)(a) is that provided in section 8(4)(c)(iii) of this act, and the court may grant no other relief, including that provided in 10-2-206 or any judicial construction of 10-2-206.~~

~~(c) A claim under 10-2-201 through 10-2-206 must be filed within 60 days after the effective date of this act.~~

NEW SECTION. SECTION 17. CODIFICATION INSTRUCTION. (1) SECTION 12 IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 49, CHAPTER 2, AND THE PROVISIONS OF TITLE 49, CHAPTER 2, APPLY TO SECTION 12.

(2) SECTION 13 IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 49, CHAPTER 3, AND THE PROVISIONS OF TITLE 49, CHAPTER 3, APPLY TO SECTION 13.

-End-

STATEMENT OF INTENT

SENATE BILL 2

(Strike entire statement of intent and insert:)

A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied ~~as a "tie-breaker"~~ among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. ~~WHERE APPLICABLE ON SCORED EXAMS OR STRUCTURED INTERVIEWS, THE RANGE FOR SUBSTANTIALLY EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS.~~ Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a public employer.

A statement of intent is also required for this bill because section 9 requires the department of administration to adopt rules implementing sections 1 through 10 and to consult with the department of social and rehabilitation services in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to

REFERENCE BILL: INCLUDES
CONFERENCE COMMITTEE AMENDMENTS 12-17-83

sections 1 through 10.

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the following matters and take into account the following considerations.

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a Montana resident ~~when--he--entered--the--service~~, veteran, disabled veteran, handicapped person, or eligible spouse. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants.

(2) Handicapped persons -- certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical or mental impairment that substantially limits one or more major life activities, and outline in what instances a physical or mental impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a

combination of a statement of general principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Honorable discharges. The legislature intends the rules to apply federal law in defining honorable discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the selection process for a job should a court order the

selection process reopened, and include a method of giving notice to those who applied for the job informing them of the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10.

SENATE BILL NO. 2

INTRODUCED BY MAZUREK, H. HAMMOND, TVEIT, HAFFEY

BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE NO. 4

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; RECONCILING THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES; AMENDING ~~SECTIONS~~ SECTION 10-2-402, ~~49-3-103, AND 49-3-201~~, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; PROVIDING FOR PARTIAL RETROACTIVE EFFECT OF THE REPEAL; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

NEW SECTION. Section 2. Purposes. ~~(1)~~ The purposes of [sections 1 through 10] are to ~~reward~~ RECOGNIZE veterans AND DISABLED VETERANS for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans, DISABLED VETERANS, and handicapped persons.

~~(2) THE PROVISIONS OF [SECTIONS 1 THROUGH 8], EXCEPT FOR COSTS AND ATTORNEY FEES, ARE INTENDED TO REMEDY THE UNCERTAINTY, HINDRANCE, BURDEN ON THE COURTS, BURDEN ON THE STATE TREASURY, AND PUBLIC CONCERN CAUSED BY THE INTERPRETATION OF THE FORMER PREFERENCE PROVISIONS IN CONFLICT WITH LONG-ESTABLISHED CUSTOMS AND PRACTICES BY PUBLIC HIRING AUTHORITIES. IT IS THE LEGISLATURE'S FINDING THAT THE PROVISIONS OF [SECTIONS 1 THROUGH 8], EXCEPT FOR COSTS AND ATTORNEY FEES, DECLARE THE ORIGINAL INTENT OF 10-2-201 THROUGH 10-2-206.~~

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual, WHETHER OR NOT HE IS A VETERAN AS DEFINED IN THIS SECTION, who:

(a) served on active duty;

(b) has been separated from service ~~under honorable conditions~~ BY HONORABLE DISCHARGE; and

(c) suffers a service-connected disability ~~as~~

determined by the United States veterans administration ~~to be 30% or more disabling~~ TO BE 30% OR MORE DISABLING.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a DISABLED veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical OR MENTAL impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

~~(iv) a unity as defined in 20-25-201, for a position within the Montana university system~~

~~(v) the office of commissioner of higher education for a position within that office~~

~~(vi) a college for a position within that college~~

~~(vii) a center or program for a position within the postsecondary vocational-technical education system~~

~~(iv) A UNIT AS DEFINED IN 20-25-201 FOR A POSITION WITHIN THE MONTANA UNIVERSITY SYSTEM~~

~~(v) THE OFFICE OF COMMISSIONER OF HIGHER EDUCATION FOR A POSITION WITHIN THAT OFFICE~~

~~(III) A COLLEGE FOR A POSITION WITHIN THAT COLLEGE;~~

~~(IV)~~ (IV) a city or town for a municipal position, including a city or municipal court position; and

~~(V)~~ (V) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)~~(V)~~(V) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)~~(V)~~(V) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, COURT REPORTER, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such

as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, ~~college, including a community college, postsecondary vocational-technical center or program, university,~~ ~~COLLEGE, INCLUDING A COMMUNITY COLLEGE, UNIVERSITY,~~ or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, ~~A COMMUNITY COLLEGE,~~ A POSTSECONDARY VOCATIONAL-TECHNICAL CENTER OR PROGRAM, ~~THE BOARD OF REGENTS OF HIGHER EDUCATION, THE MONTANA UNIVERSITY SYSTEM,~~ A COMMUNITY COLLEGE, THE BOARD OF REGENTS OF HIGHER EDUCATION, THE MONTANA UNIVERSITY SYSTEM, a special purpose district, an authority, or any political subdivision of the state other than a county,

city, or town.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons. ~~IN-A-SCORED-SELECTION-PROCEDURE-THE-RANGE-FOR SUBSTANTIALLY-EQUAL-WILL-BE-WITHIN-5-PERCENTAGE-POINTS.~~

~~(9)--"Under--honorable-conditions"-means-a-discharge-or separation-from-active-duty-characterized-as-under-honorable conditions.--The--term--includes--honorable--discharges--and general---discharges---but--does--not--include--dishonorable discharges-or-other-administrative-discharges--characterized as-other-than-honorable.~~

~~(10)~~(9) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense; and

(ii) has been separated from service ~~under-honorable conditions~~ BY HONORABLE DISCHARGE.

(b) The term does not include a ~~person--receiving retirement--pay--from--the--United-States-based-on-length-of military-service~~ RETIRED MEMBER ~~OF-A--REGULAR--COMPONENT~~ OF

THE UNITED STATES ARMED FORCES WHO IS ELIGIBLE FOR OR RECEIVING A MILITARY RETIREMENT ALLOWANCE BASED ON LENGTH OF SERVICE AND DOES NOT INCLUDE ANY OTHER RETIRED MEMBER OF A PUBLIC RETIREMENT SYSTEM, EXCEPT SOCIAL SECURITY, THAT IS SUPPORTED IN WHOLE OR IN PART BY TAX REVENUES.

~~(11)~~(10) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

(11) (A) "MENTAL IMPAIRMENT" MEANS:

(I) SUFFERING FROM A DISABILITY ATTRIBUTABLE TO MENTAL RETARDATION, CEREBRAL PALSY, EPILEPSY, AUTISM, OR ANY OTHER NEUROLOGICALLY HANDICAPPING CONDITION CLOSELY RELATED TO MENTAL RETARDATION AND REQUIRING TREATMENT SIMILAR TO THAT REQUIRED BY MENTALLY RETARDED INDIVIDUALS; OR

(II) AN ORGANIC OR MENTAL IMPAIRMENT THAT HAS SUBSTANTIAL ADVERSE EFFECTS ON AN INDIVIDUAL'S COGNITIVE OR VOLITIONAL FUNCTIONS.

(B) THE TERM MENTAL IMPAIRMENT DOES NOT INCLUDE

ALCOHOLISM OR DRUG ADDICTION AND DOES NOT INCLUDE ANY MENTAL IMPAIRMENT, DISEASE, OR DEFECT THAT HAS BEEN ASSERTED BY THE INDIVIDUAL CLAIMING THE PREFERENCE AS A DEFENSE TO ANY CRIMINAL CHARGE.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran OR HANDICAPPED PERSON over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

NEW SECTION. Section 5. Eligibility requirements. (1) No veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

~~(1) he is a United States citizen;~~

~~(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;~~

~~(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and~~

(1) HE IS A UNITED STATES CITIZEN;

(2) HE HAS RESIDED CONTINUOUSLY IN THE STATE FOR AT LEAST 1 YEAR IMMEDIATELY BEFORE APPLYING FOR EMPLOYMENT;

(3) IF APPLYING FOR MUNICIPAL OR COUNTY EMPLOYMENT, HE HAS RESIDED FOR AT LEAST 30 DAYS IMMEDIATELY BEFORE APPLYING FOR EMPLOYMENT IN THE CITY, TOWN, OR COUNTY IN WHICH EMPLOYMENT IS SOUGHT; AND

~~(4)~~(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

~~(2) IN ADDITION TO THE ELIGIBILITY REQUIREMENT PROVIDED IN SUBSECTION (1), ANY VETERAN WHOSE SERVICE IN THE ARMED FORCES FORMS THE BASIS OF AN EMPLOYMENT PREFERENCE UNDER [SECTIONS 1 THROUGH 10] MUST HAVE CLAIMED MONTANA AS HIS HOME OF RECORD AT ENTRY INTO THE ARMED FORCES, AS INDICATED ON HIS CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY (DD FORM 214).~~

NEW SECTION. Section 6. Certification of handicapped

persons. The department of social and rehabilitation services shall certify persons as handicapped for the purpose of employment preference as provided in [sections 1 through 10].

NEW SECTION. Section 7. Duration of employment preference. Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for ~~life. However, once he has obtained a~~ PERMANENT ~~position because of the application of the employment preference, he may not use the preference again~~ NO LONGER THAN ~~10~~ 15 YEARS FOLLOWING SEPARATION FROM SERVICE OR FOR NO LONGER THAN ~~10~~ 5 ~~10~~ 5 YEARS FOLLOWING [THE EFFECTIVE DATE OF THIS ACT], WHICHEVER IS LATER.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment

preference for as long as the person is missing in action or a prisoner of war.

NEW SECTION. Section 8. Enforcement of preference. (1) A public employer shall, by posting and OR on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim FOR A POSITION is a complete defense to an action IN REGARD TO THAT POSITION under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the

district court in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. ~~The~~ AT THE HEARING, THE public employer has the burden of ~~making a clear showing that the applicant was not substantially equally qualified with the person hired~~ PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT THE EMPLOYER MADE A REASONABLE DETERMINATION PURSUANT TO SUBSECTION (8) OF [SECTION 3] AND THE APPLICANT HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE IS A PREFERENCE ELIGIBLE APPLICANT.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i) AND THE COURT HAS FOUND THAT THE APPLICANT IS A PREFERENCE ELIGIBLE APPLICANT, the court shall order the public employer to reopen the

selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions

subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10]."

~~Section 12. Section 49-3-103, MCA, is amended to read:~~

~~"49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:~~

~~(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap:~~

~~(a) when based on the preference provided in [sections 1 through 10];~~

~~(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or~~

~~(c) where the differentiation is based on reasonable factors other than age;~~

~~(2) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a~~

~~retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or~~

~~(3) from discharging or otherwise disciplining an individual for good cause."~~

~~Section 13. Section 49-3-201, MCA, is amended to read:~~

~~"49-3-201. Employment of state and local government personnel. (1) State Except as provided in [sections 1 through 10], state and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin.~~

~~(2) All state and local governmental agencies shall:~~

~~(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;~~

~~(b) regularly review their personnel practices to assure compliance; and~~

~~(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.~~

~~(3) The department of administration shall insure that~~

~~the--entire--examination--process,--including--appraisal--of qualifications,-is-free-from-bias.~~

~~(4)--Appointing--authorities--shall--exercise--care--to insure-utilization-of-minority-group-persons."~~

NEW SECTION. Section 12. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS CHAPTER.

NEW SECTION. Section 13. THE APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A VIOLATION OF THIS CHAPTER.

~~NEW-SECTION.--SECTION-14.--SUBMISSION--OF--DATA.---EACH PUBLIC-EMPLOYER-SHALL-SUBMIT-TO-EACH-REGULAR-SESSION-OF--THE LEGISLATURE--A--REPORT--CONTAINING--DATA-REGARDING-VETERANS' EMPLOYMENT-UNDER-THE-PROVISIONS-OF-THIS-ACT.~~

NEW SECTION. Section 14. Repealer. ~~Subject-to-section 16(3)(a)-of-this-act,-sections--10-2-201--through--10-2-206,~~ MCA, ~~are-repealed.~~ SECTIONS 10-2-201 THROUGH 10-2-206, MCA, ARE REPEALED. THIS REPEAL APPLIES RETROACTIVELY TO BAR ANY CLAIM OF VIOLATION OR APPLICATION OF 10-2-201 THROUGH 10-2-206 THAT HAS NOT BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS

ACT]. CLAIMS UNDER 10-2-201 THROUGH 10-2-206 THAT HAVE BEEN REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS ACT] ARE ENFORCEABLE. NO CLAIM FOR A VIOLATION OF 10-2-201 THROUGH 10-2-206 MAY BE MADE UNDER [SECTION 8] OF THIS ACT.

NEW SECTION. Section 15. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 16. Effective date -- applicability ~~--saving-clause~~. (1) This act is effective on passage and approval.

(2) Except as provided in ~~subsection-(3)(b)~~ SECTION ~~14~~ 15, this act applies only to positions that are filled after the effective date of this act.

~~(3)-(a)--Subject---to---the---applicable---statute---of limitations--and-to-subsection-(3)(c),-a-claim-for-violation of-10-2-201-through-10-2-206,-whether-or-not-it--is--pending in--court--on-the-effective-date-of-this-act,-may-be-pursued under-and-must-be-governed-by-10-2-201-through-10-2-206.~~

~~(b)--However,-the-only-relief-that-may-be-granted-on--a claim--described--in--subsection--(3)(a)-is-that-provided-in section-8(4)(c)(iii)-of-this-act,-and-the-court-may-grant-no~~

~~other relief, including that provided in 10-2-206 or any judicial construction of 10-2-206.~~

~~(c) A claim under 10-2-201 through 10-2-206 must be filed within 60 days after the effective date of this act.~~

NEW SECTION. SECTION 17. CODIFICATION INSTRUCTION. (1) SECTION 12 IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 49, CHAPTER 2, AND THE PROVISIONS OF TITLE 49, CHAPTER 2, APPLY TO SECTION 12.

(2) SECTION 13 IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 49, CHAPTER 3, AND THE PROVISIONS OF TITLE 49, CHAPTER 3, APPLY TO SECTION 13.

-End-

SESSION LAWS

CHAPTER NO. 1

AN ACT PROVIDING PREFERENCE IN PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; RECONCILING THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES; AMENDING SECTION 10-2-402, MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; PROVIDING FOR PARTIAL RETROACTIVE EFFECT OF THE REPEAL; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. **Short title.** [Sections 1 through 10] may be cited as the "Montana Veterans and Handicapped Persons Employment Preference Act".

Section 2. **Purposes.** The purposes of [sections 1 through 10] are to recognize veterans and disabled veterans for service to their country, recognize past employment discrimination against handicapped persons, and facilitate the habilitation, rehabilitation, and readjustment of veterans, disabled veterans, and handicapped persons.

Section 3. **Definitions.** For the purposes of [sections 1 through 10], the following definitions apply:

(1) "Active duty" means full-time duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances. The term does not include monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard or reserves.

(2) "Disabled veteran" means an individual, whether or not he is a veteran as defined in this section, who:

(a) served on active duty;

(b) has been separated from service by honorable discharge; and

(c) suffers a service-connected disability determined by the United States veterans administration to be 30% or more disabling.

(3) "Eligible spouse" means:

(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the spouse of:

(i) a disabled veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war; or

(iii) a handicapped person determined by the department of social and rehabilitation services to have a 100% disability who is unable to use his employment preference because of his disability.

(4) "Handicapped person" means an individual certified by the department of social and rehabilitation services to have a physical or mental impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment.

(5) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

(i) a department, as defined in 2-15-102, for a position within the executive branch;

(ii) a legislative agency, such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst, for a position within the legislative branch;

(iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;

(iv) a city or town for a municipal position, including a city or municipal court position; and

(v) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in subsections (a)(i) through (a)(v) of this subsection (5), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in subsections (a)(i) through (a)(v) of this subsection (5), or current participants in a federally authorized employment program is not an initial hiring.

(6) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, court reporter, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor.

(7) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, a postsecondary vocational-technical center or program, a community college, the board of regents of higher education, the Montana university system, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(8) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

(9) (a) "Veteran" means a person who:

(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense; and

(ii) has been separated from service by honorable discharge.

(b) The term does not include a retired member of the United States armed forces who is eligible for or receiving a military retirement allowance based on length of service and does not include any other retired member of a public retirement system, except social security, that is supported in whole or in part by tax revenues.

(10) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

(11) (a) "Mental impairment" means:

(i) suffering from a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other neurologically handicapping condition closely related to mental retardation and requiring treatment similar to that required by mentally retarded individuals; or

(ii) an organic or mental impairment that has substantial adverse effects on an individual's cognitive or volitional functions.

(b) The term mental impairment does not include alcoholism or drug addiction and does not include any mental impairment, disease, or defect that has been asserted by the individual claiming the preference as a defense to any criminal charge.

Section 4. **Employment preference in initial hiring.** (1) (a) Except as provided in 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5] and claims a preference as required by [section 8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

(b) In an initial hiring, a public employer shall hire a disabled veteran or handicapped person over any other preference eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in subsection (5)(b) of [section 3] or to any other personnel action that is not an initial hiring.

Section 5. **Eligibility requirements.** No veteran, disabled veteran, eligible spouse, or handicapped person is entitled to receive employment preference as provided in [section 4] unless:

(1) he is a United States citizen;

(2) he has resided continuously in the state for at least 1 year immediately before applying for employment;

(3) if applying for municipal or county employment, he has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and

(4) he meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which he is applying.

Section 6. **Certification of handicapped persons.** The department of social and rehabilitation services shall certify persons as handicapped

for the purpose of employment preference as provided in [sections 1 through 10].

Section 7. **Duration of employment preference.** Subject to [section 5]:

(1) a handicapped person, the spouse of a handicapped person as described in subsection (3)(b)(iii) of [section 3], a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of [section 3] qualifies for employment preference as long as the disabling condition exists;

(2) a veteran, as defined in [section 3], who is not a disabled veteran, as defined in [section 3], qualifies for employment preference for no longer than 15 years following separation from service or for no longer than 5 years following [the effective date of this act], whichever is later.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of [section 3] qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of [section 3] qualifies for employment preference for as long as the person is missing in action or a prisoner of war.

Section 8. **Enforcement of preference.** (1) A public employer shall, by posting or on the application form, give notice of the preferences that [sections 1 through 10] provide in public employment.

(2) A job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim for a position is a complete defense to an action in regard to that position under subsection (4).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference.

(4) (a) An applicant who believes he has not been accorded his rights under [sections 1 through 10] may, within 30 days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(b) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which his application was received by the public employer. The petition must state facts which on their face entitle the applicant to an employment preference.

(c) (i) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. At the hearing, the public

employer has the burden of proving by a preponderance of the evidence that the employer made a reasonable determination pursuant to subsection (8) of [section 3] and the applicant has the burden of proving by a preponderance of the evidence that he is a preference eligible applicant.

(ii) The time to appear provided in subsection (4)(c)(i) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (4)(c)(i), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i) and the court has found that the applicant is a preference eligible applicant, the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

Section 9. **Adoption of rules.** The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local as well as state.

Section 10. **Conflicts with federal law.** [Sections 1 through 10] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:

"10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall *apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10].*"

Section 12. The application of an employment preference as provided for in [sections 1 through 10] and 10-2-402 by a public employer as defined in [section 3] may not be construed to constitute a violation of this chapter.

Section 13. The application of an employment preference as provided for in [sections 1 through 10] and 10-2-402 by a public employer as

defined in [section 3] may not be construed to constitute a violation of this chapter.

Section 14. **Repealer.** Sections 10-2-201 through 10-2-206, MCA, are repealed. This repeal applies retroactively to bar any claim of violation or application of 10-2-201 through 10-2-206 that has not been reduced to judgment, whether or not the judgment is final, on [the effective date of this act]. Claims under 10-2-201 through 10-2-206 that have been reduced to judgment, whether or not the judgment is final, on [the effective date of this act] are enforceable. No claim for a violation of 10-2-201 through 10-2-206 may be made under [section 8] of this act.

Section 15. **Severability.** If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 16. **Effective date — applicability.** (1) This act is effective on passage and approval.

(2) Except as provided in section 14, this act applies only to positions that are filled after the effective date of this act.

Section 17. **Codification instruction.** (1) Section 12 is intended to be codified as an integral part of Title 49, chapter 2, and the provisions of Title 49, chapter 2, apply to section 12.

(2) Section 13 is intended to be codified as an integral part of Title 49, chapter 3, and the provisions of Title 49, chapter 3, apply to section 13.

Approved December 20, 1983.

HOUSE BILL NO. 10

AN ACT EXTENDING THE PAYMENT DATE OF A LOAN TO THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES TO FUND SUBDIVISION REVIEW; AMENDING SECTION 3, CHAPTER 696, LAWS OF 1983; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 3, Chapter 696, Laws of 1983, is amended to read:

"Section 3. **General fund loan.** There is authorized from the general fund to the department of health and environmental sciences a loan up to $50,000 to be used for continuing the function of subdivision review for *the biennium ending June 30, 1985.* The loan must be repaid to the general fund no later than June 30, *1985.*"

Section 2. **Effective date.** This act is effective on passage and approval.

Approved December 16, 1983.